Supreme Court, U.S.
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No. (1)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

640 BROADWAY RENAISSANCE COMPANY,

Debtor in Possession, Petitioner,

vs.

MARIO CUOMO, as Governor of the State of New York, EDWARD I. KOCH, as Mayor of the City of New York; GEORGE M.C. DOLE, as Chairman of the New York City Loft Board; JOHN D. COOKE; CHUCK DELANEY; RICHARD M. LIEBMAN; CYNTHIA NAVARETTA; SAMUEL NEMAIZER and RAFAEL MARTINEZ, as members of the New York City Loft Board; CHARLES M. SMITH, JR., as an ex officio member of the Loft Board and as Commissioner of the New York City Department of Buildings; SYLVIA DEUTSCH, as Chairperson of the New York City Planning Commission,

Respondents,

– and –

PHOEBE RENTSCHLER; TEMPLE SMITH; JOHN EISNER; ROBERT ROSSITER; LOREN CALAWAY; RICHARD YODER; CHARLES SEARLES; RAFAEL BARRIOS; CARLOS SOSA; JUDY LEVY; JULIET HOLLAND; JOEL HINMAN; ANDREA VIGNOLI; HANNAH ESHEL; KENNETH DE LAP; LISA KRALL; NANCY HOFFMAN; RUTH HOLLOMON: KIM STEELE; RINA PELEG; DONNA GOODMAN; PETER NEPTUNE and MARIE-PAULE FAUQUE,

Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under the Constitution and Bill of Rights, does a state/city statutory scheme have the legitimate power to retroactively require: (under threat of criminal and civil penalties) (a) an existing office/loft building owner to apply for a discretionary "special permit" and zoning change, altered building application, and new residential certificate of occupancy; and (b) then totally reconstruct its building at massive and uncompensated expense (with state-licensed former tenants holding over; still in occupancy, but paying no rent), and to permanently convert it into a multiple dwelling; and then, after years of approvals, applications and construction time, (with unpaid use and occupancy for many years during the forced reconstruction process), require gratuitous grant to such former tenants (or strangers) long-term or essentially permanent residential leaseholds; where the sole basis for the retroactive legislation was the deliberate illegal use by the tenants, prior to enactment, as living lofts; and where the entire statutory scheme is delegated to mayor-appointed "Loft Board" that essentially consists of the tenants and their financial and political allies, acting as private persons;

2. Under pain of criminal and civil penalties, can a state/city statutory scheme constitutionally force the retroactive conversion of a short-term, commercial lease, already expired, into a long-term, subsidized residential estate, essentially perpetual?

3. Can a state/city statutory scheme, using a purported "emergency" as a justification, proceed to confiscate fundamental property rights without compensation? Can any such "emergency" legislation be enacted for a long duration beyond the emergency?

4. Did the courts below improperly hold that there were "no major factual distinctions" and hence misconstrue the Supreme Court dismissal "for want of a substantial federal question"? cf. Spring Realty, 511 N.Y.S 2d 830 (1986), appeal dismissed, 482 U.S.911 (1987), (where a hypothetical challenge to this statutory scheme was prematurely commenced before any "designation" and any injury sustained) as binding authority on the constitutionality of the application of the Loft Laws, to a building where an actual taking and a resulting bankruptcy has already occurred?

5. Did the involuntary application of the "Loft Laws" to 640 Broadway, result in an unconstitutional confiscation or taking, denial of due process, impairment of contracts, or unconstitutional bill of attainder or ex post facto law, or deny equal protection to the building owner, inter alia, where the statutory scheme prohibited rent collection for many years, and hence bankruptcy?

6. Can state/city legislation retroactively force (under criminal and civil penalties) a building owner to totally reconstruct its office building (permanently) for purported "public" use as a residential apartment house, without compensation, because of a "serious public emergency".

LIST OF PARTIES AND RULE 29.1 DISCLOSURE

All the names of the parties to the proceeding are set forth in the caption of the case; the non-governmental defendants ("occupants") were dismissed as parties and are not respondents herein (See Opinions below -p.1)

Disclosure pursuant to Supreme Court Rule 29.1.

Petitioner herein, debtor-in-possession, is a New York partnership (privately held) consisting of two corporations as partners: Sethlow Corp. and Renaissance Equities Corp., both privately owned, with no parents or affiliates, except that Martin R. Fine, Esq., Counsel of Record for Petitioner, is an indirect principal of petitioner.

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OPINIONS BELOW

The opinion and order of the District Court (A-B)[1], dated July 12, 1989, is reported at 740 F.Supp. 1023 (S.D.N.Y. 1990) Conboy, J. The order of the Court of Appeals (A-A) is not officially reported. The opinion and order of Judge John M. Walker, dated June 12, 1989 (A-C), which found "that plaintiff has set forth substantial federal claims", against the governmental defendants, but dismissed the pendent state claims against occupants (the non-governmental defendants), was reported at 714 F Supp. 686 (S.D.N.Y. 1989) [When Judge Walker was appointed to Second Circuit Court of Appeals, this case was reas-signed to Judge Kenneth Conboy.]

JURISDICTION OF THIS COURT

The Order of the Court of Appeals for

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1 (References: "A" - is to appendix hereto; "JA" is to joint appendix - Court of Appeals)

the Second Circuit was entered on January 2, 1991. This Petition was timely filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent text of the following provisions are set forth in the Appendix:

United States Constitution:

Art. I, Sec. 10, cl.1
Fourth Amendment
Fifth Amendment - Due Process Clause
- Takings Clause

Art. III §§1 and 2;

Sixth Amendment;

Eighth Amendment;

Thirteenth Amendment;

Fourteenth Amendment - Sec. 1;

42 U.S.C. §1983; §1988

N.Y. Multiple Dwelling Law; Art.7-C, §280-286; §§301-306; as amended

N.Y. Rent Stabilization Law of 1969; as amended

Emergency Tenants Protection Act, 1974

§§8621, et seq., Unconsol. Laws, as amended

STATEMENT OF THE CASE

Plaintiff , now a debtor-in-possession under Chapter 11, was the fee owner of a loft/office building in lower Manhattan, which brought this action pursuant to 42 U.S.C.§1983; 28 U.S.C. §1331 and §1343 and 42 U.S.C. §1943 and the Constitution because the application of Art. 7C of the New York Multiple Dwelling Law (MDL) and related statutes ("Loft Laws", MDL §§280-287; §§301-6) (A-F); which retroactively and involun-tarily designated its building as an "in-terim multiple dwelling" in April 1988, constituted an unconstitutional taking and seizure (by the "Loft Board") of Owner's fundamental property rights, including its right to collect

rent or use and occupancy for its property, and which designation requires Owner to involuntarily obtain zoning variances and totally reconstruct its building for residential use. The Loft Law "designation" turned a valuable real estate investment into property of nominal or negative value, forced into Chapter 11 bankruptcy.

The Loft Laws designation, stripped of verbiage, was dependent upon willful illegal "residential" occupancy of tenants prior to the statute's passage. The complaint, motion for summary judgment, and the actual bankruptcy resulting from the application of the statute, demonstrated conclusively that the "Loft Board" designation of 640 Broadway: (1) effectuated a taking of private property for public use without just compensation in violation of the 5th and 14th Amendments; (2) created an unconstitutional impairment of

the obligation of contracts and an unconstitutional Bill of Attainder and/or ex post facto law in violation of Art. I, Sec. 10 and (3) deprived it of liberty and property without due process and (4) denied equal protection; and otherwise violated the spirit if not the letter of the entire Bill of Rights relating to private property ownership. In 1978, Owner bought a virtually vacant office/loft building located at 640 Broadway; constructed in 1895, it consists of nine stories. Owner substantially renovated and rented it under business "loft" leases; on June 21, 1982 (enactment date of "Loft Laws") 640 Broadway was a financially stable, fully rented building (A-V); and was in compliance with all substantial provisions of the building code, its existing certificate of occupancy for office/manufacturing use and the zoning regulations; however there were willful use violations

by tenants - consisting of "residential" occupation (sleeping in building). Residential occupancy has always been illegal in this building because: (1) the certificate of occupancy mandates an office/manufacturing building; its permitted use is stores on the ground floor, and offices/manufacturing on the remaining 8 floors (A-D); (2) the building is located in an M1-5B Zone, which is a light manufacturing district under the Zoning Resolution ("ZR"), which expressly prohibited residential use, (A-V-30-4). It constitutes a misdemeanor for anyone to so occupy it (M.D.L. §304-1) (A-F-15). Although "joint living-work quarters for artists" are permitted in an M1-5B Zone, such artist quarters were prohibited in 640 Broadway - unless and until an owner first obtains a special type of discretionary zoning variance known as a "special permit" (ZR 42-14(D)(1)(b)) and

an approved alteration application (§284(1) (i) MDL) and a new residential certificate of occupancy (A-F). Obtaining these required permits and variances, and a new certificate of occupancy are lengthy and cumbersome processes which require the discretionary approval of several independent N.Y. City agencies, including City Planning Commission, Office of Economic Development, Department of Buildings [and the Board of Estimate [2]], and major reconstruction of the building. (A-V-42-3; V-1-3; V-48-51)

Although Owner does not want or need (1) a discretionary "special permit" or (2) an altered building application or (3) a new certificate of occupancy, Owner is forced under pain of criminal and civil penalties (A-F) by the 1988 Loft

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2. Recently abolished because it was held to be unconstitutional. See Board of Estimate of City of New York v. Morris, 109 S.Ct. 1433 (1989)

Laws "designation" to hire architects and lawyers for this mandated "zoning variance" approval process, to seek fundamental changes and to permanently convert from its existing office/ manufacturing use to a currently illegal residential use. (M.D.L. §284) (A-F-6)

It was uncontroverted that (a) 640 Broadway is not structurally suited to serve as a residential "multiple dwelling", and major structural changes would be required, including the installation os structural walls, hallways and doors, stairwells, staircases and exterior egress and balconies, and installation of elevators and subscantially new plumbing heating, and electrical systems, and myriad other "residential" requirements[3]; and (b) up to Two Million Dollars

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3. Also, Owner would have to forever comply with myriad city/state laws and regulations, which only apply to residential buildings, but not to office/manufacturing buildings. (A-V-14)

($2,000,000) would have to be expended to reconstruct this building to convert it into a multiple dwelling (A-K-4; V-25); compared to an arms-length purchase price in 1978, of Five Hundred Twenty-five Thousand Dollars ($525,000). Under existing city procedures, this would take years to do. The Loft Laws contemplate that this would take 3-5 years (See, §284(1)(D) M.D.L.) after (and if) this discretionary "special permit" variance was granted. (V-11; 14-16)

Although this statutory scheme is expressly dependent upon criminal violations by tenants (during the retroactively specified period of April 1980-December 1981), of the certificate of occupancy, building codes and zoning laws prior to enactment, these former tenants and squatters claim state-granted rights under the "Loft Laws" to reside at the premises (at their option), virtually in

perpetuity (after years of paying no rent or use and occupancy at all), and also require Owner, under pain of criminal and civil penalties, to invest up to $2,000,000 to reconstruct the building for a different use and purpose (presently illegal, and totally contrary to the existing certificate of occupancy, zoning and the provisions of the leases entered into). (A-V-2) The ultimate injury is that Owner must gratuitously issue to a non-paying holdover tenant (or a stranger or transferee) a residential lease in accordance with the so-called "Emergency Tenant Protection Act of 1974" (A-5) (governing modern apartment houses) which prescribed "residential" lease requires vastly increased owner obligations and services to be rendered, and constitutes a virtually perpetual leasehold; although the former tenants signed what was clearly a business lease which expressly

prohibited residential use, which was in effect when the Loft Laws were passed in June, 1982.

The Loft Laws apply whether or not the Owner had any knowledge, actual or constructive, of the illegal residential use by tenants.

Each lease expressly represented and covenanted that the premises were to be used for specified office or manufacturing purposes, and not as residences (A-H); were products of arms-length transactions, with well-educated, sophisticated adults, represented by attorneys; the proposed tenant then had a residence elsewhere, and tenants further represented compliance with all laws relating to the use of the premises[4]; The leases,

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4. Other provisions, typical of non-residental leases, included the obligation of the tenants to pay for all interior repairs and all non-structural repairs; to replace all broken glass; and to pay for all utilities, and painting, decorating, and rubbish removal. (A-H)

dated 1979-80, prior to Loft Law's enactment, stated:

> ¶58: "Tenant acknowledges that the Certificate of Occupancy, if any, for the building does not permit residential occupancy of the premises." (A-H-8)

Owner was entitled to yearly rent increases based on Consumer Price Index adjustments; and tenants expressly agreed to accept the demised premises "as is", and covenanted that:

> "Landlord shall not be obligated to do any work or make any repairs, alterations, or improvements in or to the demises premises, except as specifically set forth in this lease" ¶56. (A-H-7)

These business leases provided for a short term of between two to six years; most of these leases expired in 1983 or 1984, and all expired before the Loft Board decision in 1988. (A-V-7) The former tenants (or successors) forcibly held over beyond the expiration of the lease (claiming State-granted rights and immunities to reside on the premises indefinitely under the protection of the

Loft Laws); the tenants violated the leases in virtually every way -including the failure to pay rent, rent escalations, or use and occupancy - with state-granted immunity. (V-50-1) Since immediately after "designation" by the "Loft Board" in April 1988, none have paid any rent or use and occupancy (V-7-8); as of June 30, 1989, (summary judgment motion) Owner was owed a minimum of $465,017. in rent and use and occupancy (A-K-4) -calculated at the rates set forth in the expired leases; and extrapolated to February 1991, the minimum amount of rent confiscated or sequestered (calculated at decade-old rental rates) is now at least $820,000 plus interest, only part of the losses Owner has suffered solely by reason of the Loft Board designation. Continuing rent losses alone (at old rentals) were in excess of $20,000 per month (A-V); the out-of-pocket losses, at market value, are now much

greater because Owner is currently prevented by the Loft Laws from obtaining any rent from approximately 90% of its building (A-V-6-8). Respondents did not deny that as a direct and proximate result of "Loft Law" designation, plaintiff was forced to file a Chapter 11 petition on February 22, 1990 (S.D.N.Y. #90 B 1057 (TLB)) when the Loft Laws designation made it impossible for owner to collect any rent, and therefore impossible to pay its ordinary operating expenses, taxes and mortgage (A-I). Because tenants slept in the building in 1980-81, (in deliberate violation of explicit lease representations and state/city law) the state/city has now legislatively rewarded this retroactively selected group by granting estates in Owner's premises, and granting long-term lease-holds and financial control of Owner's building to them. Even though their deliberate residential

occupancy was a misdemeanor (M.D.L.§304); these admitted misdemeanors by the tenants were the sine qua non of the "designation" of Owners building (§281-1 (iii) M.D.L.); and Owner cannot remove them under the Loft Laws (§283 M.D.L.)[5]. (A-F)

According to lengthy and contradictory "legislative findings" (MDL §280) (A-F-1), the Loft Laws were enacted because of a "serious public emergency"; but in fact, were special interest legislation, retroactively enacted to appease a small but vocal group of politically active "artists", who were already illegally residing in the targeted buildings. It was not

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5. This illegal occcupancy continues to this day and was expressly condoned and actively encouraged by the City and State for many years between 1965 and 1982 by statute (See, Art. 7B -M.D.L.) and by official public policy, which failed to enforce the state and local laws which made it illegal to reside in buildings such as 640 Broadway, and actively encouraged loft living as a benefit to the City. (A-V3; 11-12)

denied that this group constituted certain specific tenants organizations, including lower Manhattan loft tenants association (LMLTA)[6] - and the Loft Laws were tailored to transfer to specific or identifiable persons, long-term control of these buildings (A-V-10; 30-32), were solely retroactive in coverage, and do not apply to any buildings converted after enactment; the targeted buildings were labelled "interim multiple dwellings": defined as buildings in certain zoning districts which, at any time, had been used for manufacturing or commercial purposes, and were residentially occupied by three or more, during the arbitrarily selected and

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6. Charles Delaney, a loft tenant and officer of LMLTA, was immediately appointed to the "Loft Board" remains as a member today, and votes on all matters affecting his own loft and lease status, and the rent he pays, if any, and the comprehensive "regulations" this self-serving body has promulgated. (A-V-29-32;A-P;Q;R)

retroactive period - April 1, 1980 to December 1, 1981 (MDL §281 - A-F-2).

The Loft Laws also established an "administrative body" called the "Loft Board" (MDL §282) (the composition and administration of which are fundamentally un-American), which has usurped total control of Owner's buildings. The Loft Board consists of nine members who purportedly represent the "public", the "real estate industry", "loft residential tenants" and "loft manufacturing interests" and a "chairperson", but, in fact, are all political appointees (with no specific qualifications) of the Mayor of the City of New York, and serve at the Mayor's pleasure, for such term and for such compensation as the Mayor may designate; (§282 MDL) (A-F-4) The Mayor has appointed <u>one</u> out of <u>nine</u> members to

"represent" the "real estate industry".[7] (A-V-34-35)

The Loft Law "designation" compels Owner of this retroactively selected building to seek an unwanted and discretionary zoning variance (under pain of criminal and civil penalties), and then totally reconstruct its office/loft building - at huge expense - so as to make it legally, structurally and cosmetically suitable for residential use (which is presently illegal). (A-F)[8] Failure to abide by the compliance schedule subjects

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7. The "Loft Board" has the responsibility of determining which buildings are covered by the Loft Law, and has issued regulations and rulings on every facet of "loft building" ownership, forced conversion and operation, with the actual owner of the building no longer having a real voice in the operation of its building. (A-G;O;P;Q;R)

8. Although Owner is required to comply with a rigid timetable (MDL §284 (i)) all these dates expired by statute many years prior to the official "designation" by the Loft Board in 1988. (A-F-6)

Owner to criminal and civil sanctions (MDL §284 1-(i)); (§304). The costs of this mandatory zoning variance and major conversion project, are legislatively mandated to be paid by Owner; after all the administrative and zoning and construction processes are completed, then Owner could apply to the "Loft Board" for rent "adjustments" to commence only when the Loft Board rules, the construction is complete, and a new certificate of occupancy is issued.[9] Meanwhile, Owner is prohibited by the Loft Laws from collecting ANY rent or use and occupancy, or obtaining possession of the premises. (§302-1-(b)); (§283)

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9. Furthermore, only certain direct construction costs (after lengthy "hearings" before this same biased Loft Board) later found "reasonable" and "necessary" by the Loft Board can be "passed through" to the tenants (if ever the tenants can be forced to pay anything), and those costs must be amortized over a ten or fifteen year period (M.D.L.§286(5)). The statute does not define "reasonable" or "necessary" and is otherwise vague in many important respects.

(A-F) Not only must Owner go into a new business and totally rebuild its building (with no current rent or use and occupancy) throughout an involuntary conversion process which will take many years (with occupants in unpaid possession), but Owner can not (inter alia): (a) recoup more than an arbitrary portion of the forced conversion costs; (b) obtain any interest or return upon the forced capital investment, and/or (c) obtain vacant possession of its premises. (V-46-7)

Furthermore, the Loft Laws extinguished or contradicted every substantial provision of then-existing leases for 640 Broadway, including three of the most important terms of any lease: (1) rent; (2) length of lease; (3) bargained for services; and also explicit provisions which obligated tenants to pay for all non-structural or interior

repairs, and all required building alterations in the future, either during the term of the lease or any "extension" thereof, especially any arising from enants use of the premises.[10] (A-H) The Loft Laws do not define "compliance" under MDL §285(1), but the New York courts have rigidly held that an owner must get a final certificate of occupancy as a fully converted residential building in order to collect any rent or use or occupancy. County Dollar Corp. v. Douglas, 556 N.Y.S.2d 533 (1st Dept. 1990) (A-W); 902 Associates, Ltd. v. Total Creative

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10. The likelihood of recoupment of investment, or any return upon the huge forced investment, is greatly diminished by the fact that once a "residential" certificate of occupancy is issued, the building then becomes subject to the rent control provisions of the Emergency Tenant Protection Act of 1974 (MDL §286(3)) which imposes strict limits on the amount of rent that may be charged and the tenant is granted an estate that can last for generations yet unborn, and is transferable to strangers, in complete nullification of the lease (A-S).

Services, 547 N.Y.S. 978 (App.Term 1989) (A-X). There existed no statutory basis for avoiding compliance with the Loft Laws at any time after "designation", nor at any future time.[11] Owner, declared an "interim multiple dwelling", is retroactively required (under criminal and civil penalties) to reconstruct its building to comply with residential hous-ing standards (MDL §284) (A-F) The Loft Laws' designation was the sole, direct and proximate cause of Owner's bankruptcy, since no rent was collectible from occupants using 90% of the building as state-licensed squatters; (A-I); (with the remaining 10% sequestered by the loft laws), causing

11. As originally enacted, the Loft Laws contained a purported but illusory mechanism for exemptions from coverage for buildings for which compliance would cause an "unjustifiable" hardship" (not defined) (MDL §285(2)), but it expired by statute in June 1983, before any proceeding was ever commenced to designate this as a "Loft Law" building; and those provisions lapsed 5 years prior to the designation by the "Loft Board", in 1988, that 640 Broadway was covered by the Loft Law.

a default and foreclosure proceedings on the $1 million dollar first mortgage held by a national savings bank, and bankruptcy filing. (A-I)

To be in "compliance" with the Loft Laws, Owner also had to apply for a "special permit" under the zoning law, an "altered building application", and a building permit, and a new "residential" certificate of occupancy. The necessary government approvals of the numerous plans, permits and applications that must be filed and obtained (subject to numerous reviews by "Community Planning Boards", various city agencies and the Loft Board) would take years (A-V-48-51; A-M); and forced reconstruction to residential use more years, thereafter, to accomplish; while not being able to collect any rent under the Loft Laws. Owner is thus legislatively sentenced to both a long interim and lifetime subsidization of its non-

paying former tenants (or strangers) and here, also, total loss of its property.[12]

In August, 1983, 24 persons who claimed to be illegally living at 640 Broadway filed an application with the Loft Board seeking a determination that 21 units in the building were covered by the Loft Laws. "Coverage" was contested by Owner. So-called "hearings" were conducted by various "hearing officers" (all employees of the City) between March and September 1985. Not one member of the Loft Board was present at any "hearing" to hear testimony or observe the demeanor of the witnesses; and it was uncontroverted that all members of the "Loft Board" serve at the whim and pleasure of the

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12. To add injury to insult, the "artist" requirement was deleted by statute in 1987; §281(4)M.D.L. (F-4), so now anyone who was there in 1980-81 (or their successors in 1987), became the gratutitous beneficiary of an imposed long-term leasehold. This removed the major statutory "justification" for the Loft Laws, "artists" housing.

Mayor, at salaries and for terms designated by the Mayor, and that virtually all of the "Loft Board" members had direct personal and financial interest which was directly adverse to Owner.[13]

Almost five years after the former tenants' application was filed, and almost six years after the enactment of the Loft Laws, the "Loft Board", in April 1988, determined that 640 Broadway was an "interim multiple dwelling" consisting of 20 units covered by the Loft Law[14]. Owner was ordered by the Loft Board to "register" the building (A-E-54). On the grounds that

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13. Supposedly one of the nine Loft Board members "represents" the "real estate industry" (not even a loft building owner). (A-V-34; 10; 15; 31-2).

14. The "hearings" were not "due process" hearings procedurally; including that ex parte meetings with tenants were secretly held; and staff members created biased evidentiary rules. Although no "Loft Board" member heard any testimony or witnesses - this was a triple "legislative" delegation of power: (1) from legislature to Mayor; (2) from Mayor to "Loft Board" and (3) from Loft Board to "Hearing Officer" (a City employee).

this extortionate mandatory "registration"[15] and a forced discretionary zoning variance and forcible residential conversion of the building was unconstitutional, Owner brought this action pursuant to 42 U.S.C. §1983, seeking damages as well as a permanent injunction to prevent defendants from enforcing the Loft Laws and related statutes against Owner. Since there were no genuine issues as to any material facts, Owner was entitled as a matter of law to summary judgment. The district court erroneously dismissed the complaint herein, relying virtually in toto, on the Supreme Court dismissal for "want of a substantial federal question," of Spring Realty v. New York City Loft Board, 487

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15. "Registration" requires a forced surrender of fundamental property rights, including an affidavit swearing to provide all "residential" services to non-rent paying former tenants, whether yet defined or thereafter decreed (A-O); a delivery of all leases to Loft Board (whether "commercial" or "residential")(A-Q-3); and other extortionate requirements. (See F.N.24 infra)

N.Y.S.2d 973 (Sup.Ct. N.Y. Co. 1985), aff'd, 498 N.Y.S. 2d 241 (1st Dept. 1986) modf'd on other grounds, 69 N.Y.2d 657, 511 N.Y.S.2d 830, (1986), app. dism'd, 482 U.S. 911, (1987). As noted infra (Point V), Spring Realty was not controlling because: (1) Spring Realty was dismissed because it was premature and speculative, and no buildings had been "designated" by the Loft Board as an "interim multiple dwelling"; (2) unlike here, no buildings in Spring had been statutorily barred from collecting rent or yet suffered any actual monetary damage or bankruptcy; and (3) there was no case or controversy yet in existence, for purposes of Federal Court jurisdiction under Article III.

The district court was clearly erroneous in stating that Plaintiff did not show reliance upon its present zoning classification (A-B-27-30) (the undisputed record shows exactly the opposite),

(A-V-2-3; 8-9; 12-13; 21-23) and that there were no "major factual distinctions" between Spring and the instant case.

REASONS FOR GRANTING THE WRIT

I.

DESIGNATION UNDER THE LOFT LAW AUTHORIZED A PERMANENT PHYSICAL INVASION OF OWNER'S PROPERTY AND CONSTITUTED A TAKING WITHOUT JUST COMPENSATION

This statutory scheme goes "too far" and should be recognized as a taking. Nollan v. Calif. Coastal Commission, 483 U.S. 825 (1987). First English Evan. Luth. Ch. v. Los Angeles Cty, 482 U.S. 314, (1987); Hodel v. Irving, 481 U.S. 704 (1987). The decisions of the courts below conflict with express constitutional provisions, and controlling authority of the Supreme Court and decisions of other circuits; Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, (1982); Hall v. City of Santa Barbara, amended, 833 Fed.2d 1270 (9th

Cir. 1987); Cert. denied, 485 U.S. 940 (1988); Pinewood Estates v. Barnegat TP Leveling Board, 898 F. 2d 347 (3rd Cir. 1990); Ross v. City of Berkeley, 655 F. Supp. 820 (N.D. Cal. 1987); cf Seawall Associates v. City of N.Y., 74 N.Y.2d 92 (Ct. of App. 1989). Under its valid certificate of occupancy, this building can only be used for manufacturing or office purposes; the net effect of the Loft Laws "designation" is to deprive Owner of its basic property rights, including, but not limited to, precluding Owner from using it in accord-ance with its existing certificate of occupancy and zoning. Furthermore, the Loft Laws extinguish Owner's rights to collect rent, or use and occupancy, for an indefinite period. The Loft Laws expressly deprive Owner of the right to terminate tenants unpaid use by removing them (MDL 286-1) (A-F-9); Owner has a Hobson's choice: (1)

if Owner wants to ever collect rent (at some distant future time), it must convert the building to a multiple dwelling at huge expense, enter a new business with no means to pay for or finance the reconstruction; or (2) it cannot collect any rent, nor ever recover possession of its property; and is subject to criminal and civil penalties anyway. (MDL §304) Thus, because tenants illegally slept in the building in 1980-81, Owner is now legislatively stripped of the right to use the building for the only legal use thereof since it was built.[16] The Loft Laws also deprive Owner of the fundamental right to decide how it will invest funds. It was not disputed that to reconstruct

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16. The Loft Laws do not apply to any specific zoning map or geography, but are applied on a specific, building by building basis retroactively selected to include specific persons and buildings, during that sole arbitrary period of 1980-81; Owner's knowledge or consent is irrelevant.

the building to comply with applicable multiple dwelling laws, Owner would have a forced expenditure of up to Two Million ($2,000,000) Dollars (A-V) to: (a) obtain a discretionary zoning variance, a "special permit," an altered building application and a new certificate of occupancy it does not want or need; (b) make major structural alterations and improvements, unnecessary for existing legal uses; and (c) permanently convert a presently legal office/manufacturing building into a residential multiple dwelling, to satisfy its former tenants, (now squatters paying no rent for use and occupancy for an indefinite time period) and to suffer the long-term leasehold estates granted them in Owner's property, by this legislation. Owner never authorized perpetual, at will, lease renewals for tenants, with no obligations; the State did that. Owner never authorized

occupants to use the premises rent-free; the State did that; thus the state/city confiscated all but the bare legal title of Owner's fee estate. The Constitution prevents a state/city from imposing permanent legal relationships, to which the owner never agreed or consented, which constitutes a lifetime (or longer) enforceable estate in Owner's property, and annihilates its marketability. Loretto supra; Sederquist v. City of Tiburon, 265 F.2d 756 (9th Cir. 1984); Silverman v. Barry, 727 F.2d 1121 (D.C.Cir. 1984)

Where state action results in the physical occupation of private property, there is a per se taking; when the character of the government action

> "is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only a minimal economic impact on the owner". Loretto, 458 U.S. at 434-5.

In Loretto, even though the amount of

space occupied by cable, wires and boxes was minimal, this was a per se taking for which compensation must be paid. Here, the invasion is vastly more pervasive, virtually total (eight stories out of a nine-story building are totally taken) the income from the balance of the building is sequestered to subsidize the non-paying "residential" tenants, and complete operational control of the building, and its future use and rental value are usurped. (A-V-48) The Loft Laws demand that owners of a few arbitrarily and retroactively selected commercial buildings, acquiesce to permanent occupation of their property by illegal residential tenants, and incredibly, the sine qua non of this legislation is the tenants' deliberate pre-enactment illegal use. Owner here executed short leases (which expired long ago); the challenged statutes retroactively require Owner to

permit the long-term physical occupation of its building by third parties, and an affirmative obligation to reconstruct the building to tenants' whims at Owner's expense without compensation. Loretto, supra; Kaiser Aetna v. U.S., 444 U.S. 164, (1979); Herrington v. Sonoma County, 834 F.2d 1488 (9th Cir. 1987). In Hall v. City of Santa Barbara, supra, the owners of a mobile home park brought a §1983 action challenging an ordinance which required mobile home park owners to offer tenants leases of unlimited duration and imposed strict limits on rent increases. The Ninth Circuit held the complaint stated a claim for a taking by physical occupation under Loretto, because the ordinance transferred a possessory interest in the owner's land to each mobile home tenant, and that:

"this interest consists of the right to occupy the property in perpetuity while paying only a fraction of what it is worth in rent..." 833 F.2d @1276

The Ninth Circuit recognized that the ordinance overstepped the boundaries of mere "regulation" and constituted permanent occupation of the property for which compensation was due[17]. Significantly, the court refused to

"indulge the notion that a city may eviscerate a property owner's rights and shield its action from constitutional scrutiny by calling it rent control." 833 F.2d 1278.

Here, Owner's rights to decide who occupies its property and upon what terms are asphyxiated. Property rights are described as the right "to possess, use and dispose of it." United States v. General Motors Corp., 323 U.S. 373, 378 (1945). Sawyer v. U.S. Steel et al, 197 F.2d 582, _____

17. Nor did it matter in Hall that the physical occupation was by the mobile home tenant and not by the City of Santa Barbara itself. As noted in Hall, the Supreme Court addressed this issue in Loretto and held that "[a] permanent physical occupation authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant. 458 U.S. at 432, fn. 9.

aff'd 343 U.S. 579 (1952).

"The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." Loretto, 458 U.S. at 426.

Loft Laws "designation" extinguished Owner's rights to possess, rent or use its own building, or exclude squatters or occupants from long term unpaid possession or use. Even a temporary taking creates the constitutional obligation to pay just compensation. First Eng. Evan Lutheran Church v. Los Angeles, supra. The Loft Laws constitute a per se taking, in violation of the 5th and 14th Amendments, and the decision in the Second Circuit conflicts with the Constitution and controlling Supreme Court authority.[18]

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18. Accord: Loretto, supra; Kaiser-Aetna, supra; Nollan, supra; San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621 Pinewood Estates, supra; Media General Cable v. Sequoya Condo. Council, 737 F.Supp. 903 (E.D. Va.1990); Azul Pacifico, Inc. v. City of Los Angeles, 740 F.Supp. 772 (C.D.Cal. 1990); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 499 U.S. 155 (1980).

II -THE LOFT LAWS AS APPLIED HEREIN CONSTITUTE AN UNCONSTITUTIONAL IMPAIRMENT OF PRIVATE CONTRACTS UNDER ART. I, §10

"No State shall... pass any... Law impairing the Obligations of Contracts." The threshold inquiry is whether the law operates as a substantial impairment of the contractual relationship. Allied Structural Steel Co., v. Spannaus, 438 US 234. (1978) The severity of impairment increases the level of scrutiny applied; substantial impact is undeniably present here. Leases, like other contracts;

> "enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them." Allied Structural, 438 U.S. at 245.

The Loft Laws totally altered the short-term contractual relationship between tenants and Owner, and superimposed indefinite and crippling monetary and property obligations on

Owner, conspicuously beyond what Owner agreed to undertake. It is beyond dispute that the Loft Laws repudiate these leases in virtually every way, and were so retroactively designed (MDL §286) (A-F). Under the Loft Laws former tenants have by state fiat: (a) extended their occupancy -most for more than six additional years already; (b) made unauthorized subdivisions; and sold, assigned and sublet (for windfall profits) their new property "rights" to unpaid occupancy; and (c) otherwise profiteered from Owner's property, by subletting and using the Owner's premises rent-free. Virtually every clause of the lease is cavalierly extinguished, including all provisions relating to paying rent, specified repairs and bargained-for services, and the term of the lease. With reckless disregard for the property rights of Owner, the Loft Laws shift economic burdens from tenant to

Owner, and (1) transform the short-term commercial relationship (freely entered) into one for which they never bargained: a long time, subsidized residential estate; (2) abrogate virtually all contractual obligations of tenant; including the nullification of the Owner's rights to collect rent (MDL §301 & 302). The Loft Laws also compel Owner, at unconscionable expense, to totally reconstruct the building into a multiple dwelling (MDL §284), without compensation; and notwithstanding that it is structurally unsuited for residential use, that it is contrary to the applicable zoning, and the building's existing certicate of occupancy. Owner must then (under compulsion of state criminal and civil penalties including imprisonment up to six months, (MDL §304) (F-16)) give the tenant a long term, burdensome residential lease (M.D.L. §284-1(ii)). For a state statute

to be reasonable and necessary to serve a legitimate public purpose, it must be enacted to protect a basic societal interest, not merely the personal interest of retroactively selected private individuals. Allied Structural Steel, supra; Home Bldg. & Loan Assoc. v. Blaisdell, 290 U.S. 398, (1934) The con-tracts clause forbids an alteration in the relative position of two parties to an existing contract. West Indian Trading Co., Ltd. v. Gov't of Virgin Islands, 844 F.2d 1007 (3rd Cir. 1988); South Terminal Corp. v. E.P.A., 504 F.2d 646, 680 (1st Cir. 1974). Here, there is a total alteration of the rights of parties to a lease.

In adopting the Loft Laws, the legislature "found" an "emergency" justified enactment. In reality, the so-called "emergency" which was the basis for the statute, was only that tenants knowingly

violated their leases (and criminal statutes) by illegally residing in this building - and then wanted the state-granted "right" to do so in perpetuity, under much more favorable terms. If an "emergency" existed, it was totally self-created by the tenants and/or it was in a different industry -the rental housing industry. The Loft Laws rewarded these specific, identifiable and retroactively selected illegal occupants, by retroactively transferring to them Owner's property rights.

> A state cannot "adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them". Home Bldg and Loan Assoc. v. Blaisdell, supra, at 439 (1934).

Here, it is undisputed that the "rent stabilized" residential tenancies forcibly created, could last for generations yet unborn (A-S,T). The nullification of all essential contractual terms, and which effectively grants a perpetual leasehold

interest in the premises, is far worse than in Allied Structural Steel, supra, especially where Owner is prevented from collecting any rent for an indefinite period. Contracts are not subject to unlimited modifications under "police power" and must serve a legitimate public purpose. United States Trust Co. v. New Jersey, 431 U.S. 1 at 22 (1977). As the Supreme Court held in Allied Structural Steel Co. supra,

> "... thus, the statute in question here nullifies express terms of the company's contractual obligations and imposes completely unexpected liability in potentially disabling amounts." 438 U.S. at 247.

There was no desperate nationwide depression as "justification" here:

> "Moreover, in at least one other important respect the Act does not resemble the mortgage moratorium legislation whose constitutionality was upheld in the Blaisdell case. This legislation, imposing a sudden, totally unanticipated, and substantial retroactive obligation upon the company to its employees was not enacted to deal with a situation remotely approaching the broad and desperate emergency economic conditions of the early 1930's conditions of which the Court in Blaisdell took judicial notice." 438 U.S. at 249.

Neither did the Loft Laws:

> ". . . effect simply a temporary alteration of the contractual relationships of those within its coverage, but worked a severe, permanent, and immediate change in those relationships - irrevocably and retroactively. Cf. United States Trust v. New Jersey, 431 U.S.at 22..." Allied Structural Steel, 438 U.S. at 249

The Loft Laws retroactively imposed vast losses upon Owner, and totally altered the relative position of the parties to an existing lease (A-U;K-4;V-50-1): thus plaintiff re-troactively had its legitimate contractual expectations destroyed[19]. Whether by gun or legislative

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19. By imposing a totally new, long-term economic relationship upon Owner, the Loft Laws not only nullified the bargained-for lease expiration date, but also disregard that, in calculating the rent for the services which Owner agreed to provide to tenants, Owner was never compensated for furnishing a totally rebuilt and reconstructed building plus a panoply of expensive additional "residential" services that are mandated by a myriad of laws and regulations governing residential tenancies in New York City. e.g.; (A-F;S;T).

pen, the result is the same.[20] Nieves v. Hess Oil Virgin Islands Corp. 819 F.2d 1237 (3rd Cir. 1987). In depriving Owner of the long-term ability to obtain rent-paying and legal office tenants, and requiring Owner to suffer long-term estates from non-paying residential tenants (under state license) the Loft Laws have usurped Owner's fundamental rights.[21]

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20. Furthermore, former tenants or current occupants are completely free to leave or skip out at any time during these years-long proceedings (leaving huge rent arrears uncollectible), and have no real obligations to Owner under the Loft Laws. It is interesting to note that although the Loft Laws contain a comprehensive section called "Owner Obligations" (M.D.L.§284)(A-F-6), there is no section called "Tenant Obligations".

21. The Loft Laws also deprived Owner of all rights to decide who its tenants would be, and upon what terms. There are occupants who have never had any lease or contractual relationship with Owner (and who have never paid any rent), but the Laws compel Owner to accept strangers and assignees as permanent residential tenants with long-term transferrable estates, at their will, and reconstruct the building to their whim, without even the current

III -MULTIPLE DWELLING LAW, SEC. 301 AND 302, WHICH PREVENTS OWNER FROM COLLECTING RENT FOR MANY YEARS, IS UNCONSTITUTIONAL AS APPLIED HERE

The "Loft Laws" are unconstitutional as applied here, because they deprive the property owner of a most fundamental property right, i.e. the right to collect rent. (A-F-14-5) Denying rent collection for an indefinite period, while Owner is forced to apply for unnecessary and self-destructive zoning and certificate of occupancy changes (with numerous hearings, administrative proceedings, and discretionary approvals), and forced reconstruction of its office/loft building into a subsidized apartment house, was a taking of its property rights; its rent was its only source of income.

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payment of any rent and/or use and occupancy. (A-F)

". . . But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does. Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive trans-formation of private into public property -without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment." Hughes v. Washington, 389 U.S. 290 at 298 (1967); Separate Opinion, Mr. Justice Stewart, concurring.

No business or property owner can survive when the state/city government decrees that "customers" can use or occupy or take owner's property or goods for free (until some future distant time) any more than a candy or shoe store could survive when the legislature decrees that "customers" can take candy or shoes with no need to pay, in order to remedy some alleged "public" problem.

> **RENT.** Consideration paid for use or occupation of property...Compensation or return of value given at stated times for the possession of lands and tenements corporeal . . .
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> **Blacks Law Dictionary (6th Ed)**

The Loft Laws, as interpreted by N.Y. courts, County Dollar Corp., supra, (A-W) 902 Associates, supra (A-X) have decreed that no rent or use and occupancy are collectible for a prolonged period, (implied to be 3-5 years (MDL §284) or more) (A-F-6). For real property investment, rent is the sole means of subsistence -its life's blood. The real estate, banking, construction and mortgage industries rest upon the bedrock concept that tenants must pay rent for using and occupying property; without rent, there is no economic value to any real estate investment; here this fundamental property right has been extinguished or indefinitely delayed by retroactive statutory fiat.[22]

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22. First Eng. Evan. Luth. Ch., supra; Allied Structural, supra, United States v. General Motors, supra; Cummings v. Missouri, supra, cf. Flushing National Bank v. Mun. Assist. Corp., etc., 40 N.Y. 2d 731, 390 N.Y.S.2d 22 (1976).

IV - THE LOFT LAWS AS HERE APPLIED, VIOLATE THE SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS OF OWNER

The Loft Laws were not meant to protect the lives or safety of the public generally, but only to augment the property rights of a favored few, retroactively selected (A-V-30-3): (tenants who refused to abide by leases and criminal laws, refused to pay rent or use and occupancy, and refused to vacate when leases ended); their self-created "emergency" was solved by legislative transfer of long-term property rights, in premises which they had merely rented or occupied. A state does not have the constitutional power to seize control of a building and turn it over to former tenants, because tenants want long-term estates (and more) in another's building, and naturally, "court disputes" have arisen. Without a serious constitutional guarantee of

property rights, property has no value[23]; builders or investors or lenders won't invest in a state which capriciously and retroactively eviscerates property rights; thus the Loft Laws, if upheld here, would be very counterproductive to all New York real estate, and the economy, development and employment of New York, the rest of the Second Circuit, and the investment climate of the nation.[24] cf. Flushing Nat. Bank v. MAC, supra.

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23. Here, not only is property ownership essentially seized (soon to be wiped out in foreclosure or bankruptcy), but the national bank holding the first mortgage also has the value of its collateral annihilated by retroactive legislative fiat. Furthermore, City and and State real estate tax revenue will be diminished because "designation" under the Loft Laws asphyxiates market value and hence tax assessments.

24. Since the Loft Laws were totally retroactive, there was no opportunity to avoid compliance before Owner's property was seized. The illusory "hardship" exemption lapsed by statute five years before this building was designated, and before a "coverage" application was filed; furthermore, the purported "exemption" required "registration" under the statute in order to apply, with forfeit of substantial property

Furthermore, the "Loft Board" is an unconstitutional "administrative body"; consisting of nine persons, all appointed by the mayor (with no other approval or consent) serving for such terms, at such salaries as the mayor may designate, and with no specific qualifications of any kind, but supposedly as "representatives" of specific interest groups. (§282 -A-F-4). Eight out of nine members are, by status, adverse to Owner's property interests (A-34-5).[25] The fundamental

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rights: including the forced recording of a covenant running with the land for 15 years (MDL §285-2) (F-8); and required sworn affidavits of complex financial information with respect to future income, expense and capital investment that was unknown or unknowable. Furthermore the statutes contained no definition of "hardship"; it is therefore obvious, as admitted by the state/city, why no such "hardship" exemption was ever granted. (A-V-44-5)

25. The state did not have the constitutional power to make the mayor the Czar of private real estate, and the mayor did not have the constitutional power to further delegate such to a group of private individuals, virtually all of whom have direct pecuniary or political interest

ownership rights of property are not to be divided among special interest groups, at the mayor's, legislature's whim or "Loft Board's" whim;... "not bound by any official duty, but... free to withhold consent for selfish reasons or arbitrarily, and... subject... to their will or caprice" Seattle Trust Co. v. Rogerge, 278 U.S. at 122.

Owner's substantive due process rights are destroyed because 640 Broadway is structurally unsuitable for residential use, and Owner is retroactively forced into bankruptcy by actual operation and effect of the Loft Laws.[26] Forcing owner to obtain a discretionary "special permit"

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adverse to the building owner, and financially affected by their own decisions. See, Gibson v. Berryhill, 411 U.S. 564 (1973), Eubank v. Richmond, 226 U.S.137 (1912); Washington ex rel v. Seattle Title Trust Co. Roberge, 278 U.S. 116 (1928).

26. Furthermore, the Chairman of the Loft Board demonstrated total disdain for the U.S. Constitution by issuing "emergency" regulations

and retroactively imposing an affirmative obligation of totally reconstructing its building under an "altered building application" is a compulsory zoning variance, unprecedented in the United States.[27] Zoning variances were created to resolve property owners' hardships, not prolong, create or perpetuate them; they are by nature permissive, not mandatory:

> "A variance permits an individual to use his property in a manner which an ordinance, literally enforced, would otherwise prohibit . . . Intended to meet situations that can not be resolved in advance by ordinance, a variance relieves individual property owners from the harsh, unintended, or foreseeable consequences of rigid enforcement..." (Cites omitted) **Barbian v. Panagis**, 694 F.2d 476 at (7th Cir. 1982). (Cites omitted)

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of major substance, by himself (without the Loft Board) with no public hearings or opportunity for comment permitted, because the Loft Board chairman believed: "observance of the requirement for notice and opportunity for comment in writing would be contrary to the public interest" (A-P-8).

27. cf. Keystone Associates vs. Moerdler, 19 N.Y.2d 78 (Ct.Appeals 1966); Fred French Investing Co. v. City of New York. 39 N.Y.2d 587, 385 N.Y.S.2d 5 cert. denied 429 U.S. 990. (1976) Seawall Associates, Ltd., supra.

The Loft Laws designation created a cloud on title and marketability, and totally annihilated normal investment expectations Urbanizadora Versalles Inc. v. Rios, 701 F.2d 993 (1st Cir. 1983). The holder of a valid building permit obtains a vested interest therein when he has performed substantial work in reliance upon that permit, Lefrak Forest Hills Corp. v. Galvin. 338 N.Y.S.2d 932, aff'd. 32 N.Y.2d 796 (1953); even when there is a subsequent change in zoning or building regulations prior to the completion of the building subject to permit. Matter of Temkin v. Karagheuzoff, 34 N.Y.2d 324, (1974).

> "It is well settled that one who, in reliance upon a permit validly issued by a municipality in good faith makes substantial improvements and incurs substantial expense in order to make his land suitable for a specific purpose or use, acquires a vested right to such use, even though, by reason of subsequent changes in the zoning ordinance, such use has become a prohibited or non-conforming use." (cites omitted) Glenel Realty Corp. v. Worthington, 164 N.Y. S.2d, 625, 638 (2d Dept. 1957).

A fortiori, a validly issued certificate of occupancy (only issued upon final completion of work under a building permit) creates vested property rights. Owner of 640 Broadway relied on existing zoning, and the valid 1966 certificate of occupancy (A-D), in the purchase and rehabilitation of a then virtually vacant building (A-V-4;5-6;2) which was a continuation of its conforming use as an office/manufacturing building for more than 90 years. In Lefrak, supra, the N.Y. Court of Appeals recognized vested rights in continuation of a particular zoning classification, where there is reliance upon the zoning, and substantial construction work has been done; it held that the installation of a foundation was enough. Here, Owner had a completed, long-standing office/manufacturing building, which the zoning always permitted and still does. Owner

has a fundamental right to continue the office/ manufacturing use of its building, which is the conforming use, and was the legal use of the building since built[28] and the city/state cannot constitutionally require Owner to apply for a discretionary zoning variance.

V - THIS COURT'S DISMISSAL OF THE NEW YORK CASE OF SPRING REALTY WAS NOT APPLICABLE OR CONTROLLING TO THE CASE AT BAR AND WAS ERRONEOUSLY RELIED UPON BY THE COURTS BELOW

Spring Realty, supra, was premature and speculative, for federal court jurisdiction, since there was no "designated" building under the Loft Laws; here is an

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28. It was uncontroverted that Owner bought an office building and substantially improved it in reliance upon its valid certificate of occupancy and zoning (A-V;8-9;21); the district court's statement that Owner "has proffered no evidence that it performed 'substantial work' in reliance upon pre-Loft Law zoning regulations" (A-B-28), is clearly erroneous upon the record, and upon motion for summary judgment, plaintiff's pleadings were to be deemed true. (A-K;J;V)

actual case and controversy, after official "designation" by the Loft Board in 1988 (A-E), which caused actual damage and bankruptcy.[29] The Supreme Court properly declined to review Spring Realty for "want of a substantial federal question" because, as the record and decisions therein clearly indicated, the Loft Laws had never been officially applied to those buildings; Under Art. III, Sec. 1 of the Constitution, federal courts only have jurisdiction over actual cases and controversies. Rizzo v. Goode, 423 U.S. 362 (1976). Spring Realty was a state declaratory judgment action and plaintiffs merely "assumed" that they were covered by the law (JA 596-608); no proceedings had even been commenced to "designate" such buildings under the

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29. Plaintiff herein waited 6 years after enactment to commence suit, because it knew that if a case was commenced prior to official "designation", the state/city would call it "premature".

Loft Laws.[30] (JA-552-4) Thus, an advisory opinion was being requested in the federal courts, contrary to Art. III, Sec. 1.

In Spring Realty, owners were not affirmatively required to obtain a discretionary zoning variance or "special permit" to change the building's certificate of occupancy to a residential building. In Spring Realty, the City claimed no present showing of a taking, prematurity and conjecture, and that building owners were making "conclusory" "alarmist speculations" without support in the statute or or in the record. (JA 603-608) Here, official "designation" as an "interim multiple dwelling" has occured, a

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30. Also, in Spring Realty (by stipulation), the State of New York was discontinued as a party, and was not a party to the action. Here, the State, City, Mayor and Loft Board are all parties; since the state legislature passed and was responsible for enforcement of the Loft Laws, the state was an indispensible party, and was not present as such in Spring Realty.

public document, clouding owner's fee title and requiring a dedication of the building to purported "public" use. (A-E) Immediately after such "Loft Board" designation, all "designated" tenants stopped paying rent or use and occupancy, claiming such rights under the Loft Laws, and Owner was rendered bankrupt because it could not, under the Loft Laws, collect any rent or use and occupancy. Since, Spring Realty's buildings were not "designated" by the Loft Board, and no actual damage or taking was proved, the courts below were clearly erroneous in relying upon the dismissal of Spring Realty, for want of a substantial federal question, as having binding precedental effect in this action.

VI - THE LOFT LAW IMPOSES A PUNITIVE RETROACTIVE CONFISCATION OF PROPERTY, THEREFORE IT CONSTITUTES AN UNCONSTITUTIONAL BILL OF ATTAINDER OR EX POST FACTO LAW

The undisputed facts show that the

Loft Laws constitute an unconstitutional Bill of Attainder, or bill of "pains and penalties" included therein, or ex post facto law; i.e., legislative punishment for retroactively decreed crimes, Cummings v. Missouri, 71 U.S. [4 Wall] 277, 18 L.Ed. 356, (1867). The specific buildings which were retroactively subjected to the Loft Laws, by defendants' admission, were known to them in advance of enactment, and were retroactively pre-selected from specific membership lists of tenants organizations (A-V-29-32); the sine qua non of the Loft Laws is that the tenant who illegally lived there (or transferee) is rewarded with a long-term estate in the premises at the expense of Owner. The owners of such buildings were retroactively singled out for disparate treatment. United States v. Lovett, 328 U.S. 303 (1946); U.S. v. Brown, 28 U.S. 437 (1965). That

the Loft Laws constitute a form of legislative punishment also can not be denied. (MDL §304; §302-1-b; §284-1-ii; §282) (A-F). Basic property rights have been seized; uncompensated compulsory capital investment of up to Two Million Dollars, and a forced zoning change and repudiation of the certificate of occupancy is not "regulation". Rather, it constitutes punitive confiscation of Ow-ner's property, including rent collection, retroactively and legislatively imposed; such non-judicial punishment upon an identifiable group is a violation of the Bill of Attainder and ex post facto Clauses.[31] Cummings v.

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31. Even though the Loft Law does not contain any definition of the purported "crime", it cannot be denied that Owner has been punished for its pre-enactment "status". The Loft Laws do not depend on whether or not the Owner "knew or constructively knew" about the illegal residential use; all are snared in the same trap if the narrowly defined conditions existed for that pre-enactment time period (April 1980-December 1981), and the building is permanently ensnared.

Missouri; cf. 19th St. Assoc. v. State of N.Y. (Sup.Ct.N.Y.Co. 1989), NYLJ - 7/20/90 p.22, Col.5. Furthermore, the existing punishment for violation of the M.D.L. was fines of $500 or $1,000; the state/city ignored existing law (MDL §304; A-F-15-6) and passed the Loft Laws instead, inflicting virtual confiscation of the property for the unnamed "crime" of permitting tenants to live in a loft. The bill of attainder and ex post facto clauses prohibit enactment of laws that either impose punishments for acts not punishable at the time they were committed, or increase punishment over that previously prescribed. Cummings v. Missouri, supra; Fletcher v. Peck, 10 U.S. (6 Cranch) 128 (1810)[32]

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32. Louis Vuitton, S.A. v. Spencer Handbags 765 F2d 966 (2nd Cir 1985); Weaver v. Graham, 450 U.S. 24 (1981). Harisades v. Shaughnessy 342 U.S. 580 (19); Deveau v. Braisted 363 U.S 144 (1960) cf. People v. Broadway-Sheridan Arms, 90 N.Y.S.2d 445 (1st Dept. 1949); aff'd. 300 N.Y.S. 59 (1949).

The Loft Laws have already confiscated owners equity in the property, and forced it's bankruptcy, but further, now: (1) compel Owner nevertheless to undertake complete reconstruction; (2) Owner is retroactively stripped of rights to own a lawful commercial building, and (3) all substantial property rights are extinguished or rendered valueless, including the Owner's right to collect rent for an indefinite period, to choose tenants, or to negotiate any aspect of any lease at any time in the foreseeable future. This is either a classic Bill of Attainder, or a "bill of pains and penalties," which the Supreme Court has long held as included in the prohibition. Cummings v. Misssouri, supra; Fletcher v. Peck, supra.

While the Loft Law "findings" and the state/city briefs below contained blanket "indictments" because allegedly many loft

building owners "often collaborated" (JA 613-4) (§280 M.D.L.); the legislative indictment and punishment was constitutionally infirm because it constituted a Bill of Attainder or ex post facto law.[33]

VII - THE LOFT LAWS DEPRIVE OWNER OF EQUAL PROTECTION OF THE LAW

In Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985), the Court held a statute unconstitutional because the retroactive distinction between different classes of resident veterans, by the date they moved to New Mexico, was not rationally related to the asserted goal of encouraging veterans to settle in the

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33. Even assuming, arguendo, that the Owner knew or should have known that the tenants used the premises illegally, there was no justification for retroactive legislative expropriation; There is clearly an improper presumption of guilt, and a retroactive legislative punishment. cf. United States v. Brown, supra. If the Owner committed any crime, the state/city could have prosecuted Owner under existing law, instead Owner was punished by legislative seizure; furthermore, increasing the penalty for previously committed "wrongs" is also improper law. Cummings v. Missouri, supra; Fletcher v. Peck, supra.

state. Here, there was no rational basis in June 1982,for treating owners of buildings with illegal residential tenants, during the capriciously selected period (April 1, 1980 - December 1, 1981) totally differently from other owners that had residential tenancies either: (a) prior to those dates, or (b) after those retroactively selected dates; both classes of which were exempted;[34] This retroactive classification did not rationally further a legitimate government purpose. The statutory scheme invidiously discriminated in another major way, excluding buildings owned by a municipality (MDL §281-1(ii));

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34. creating a specially burdened class of building owners and specially privileged class of occupants, distinguished only by the dates of the tenants' willful illegal occupancy, prior to enactment. City of Cleburn v. Cleburn Living Center, 473 U.S. 432, (1985); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985); Plyer v. Doe, 457 U.S. 202 (1982); Zobel v. Williams, 457 U.S. 55 (1982); United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973); English v. Town of Huntington, 448 F.2d 319 2nd Cir. 1971)

there was no rational reason to exclude municipally-owned buildings, and there are numerous other discriminatory provisions too numerous to detail here.[35]

CONCLUSION

This case presents fundamental questions of nationwide importance and a writ of certiorari should be granted; if the property rights provisions of the Constitution and the Bill of Rights are eviscerated or rendered meaningless, as here, by retroactive state/city legislation, then the investment value of all commercial real estate in the nation (dependent upon rent income) is substantially diminished.

Dated: March 31, 1991
New York, N. Y.

Respectfully Submitted,

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APPENDICES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 2nd day of January, one thousand nine hundred and ninety. [sic]

United States
Court of Appeals
Filed Jan. 2, 1991
Second Circuit

PRESENT:

HONORABLE JON O. NEWMAN,
HONORABLE RALPH K. WINTER,
Circuit Judges.
HONORABLE T.F. GILROY DALY,
District Judge.*

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640 BROADWAY RENAISSANCE COMPANY,

Plaintiff-Appellant,

v. 90-7717

MARIO CUOMO, as Governor of the State of New York, ET AL., Defendants-Appellees.

O R D E R

640 Broadway Renaissance Company ("Broadway") appeals from the July 31, 1990, judgment of District Court for the Southern District of New York (Kenneth Conboy, Judge)

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* Of the District Court for the District of Connecticut, sitting by designation.

denying Broadway's motion for summary judgment and granting summary judgment in favor of defendants New York Governor Mario M. Cuomo, former New York City Mayor Edward I. Koch, and members of the New York City Loft Board. 740 F. Supp. 1023 (S.D.N.Y. 1990). Broadway presents a host of challenges to the constitutionality of Article 7-C of the New York State Multiple Dwelling Law, § 280 *et seq.* (McKinney Supp. 1990) ("the Loft Law"). The Loft Law establishes a system for assuring compliance with New York City building and zoning codes by all "interim multiple dwellings," *i.e.*, buildings illegally converted from commercial to residential use during a sixteen-month period from 1980 to 1981. Upon the classification of appellant's building at 640 Broadway as an "interim multiple dwelling" under section 281 of the Loft Law, Broadway brought the instant suit seeking declaratory and injunctive relief invalidating the Loft Law and three million dollars in damages from each of the government defendants; Broadway also asserted common law fraud and breach of contract claims against the residential tenants of 640 Broadway. Broadway's state law claims were earlier dismissed for lack of subject matter jurisdiction. *See 640 Broadway Renaissance Co. v. Cuomo*, 714 F. Supp. 686 (S.D.N.Y. 1989).

The Supreme Court's dismissal of a prior challenge to the Loft Law in *Spring Realty Co. v. New York City Loft Board*, 127 Misc.2d 1090, 487 N.Y.S.2d 973 (Sup. Ct. N.Y. Co. 1985), *aff'd*, 117 A.D.2d 1029, 498 N.Y.S.2d 241 (1st Dep't), *aff'd as modified on other grounds*, 69 N.Y.2d 657, 503 N.E.2d 1367, 511 N.Y.S.2d 830 (1986), *appeal dismissed for want of a substantial federal question*, 482 U.S. 911 (1987), bars the majority of Broadway's constitutional claims. Once the Supreme Court has dismissed an appeal for want of a substantial federal question, we are bound to treat that decision as rejecting on the merits those issues presented in the jurisdictional statement and necessarily decided. *See Mandel v. Bradley*, 432 U.S. 173 (1977) (per curiam); *League*

of Women Voters v. Nassau County Board of Supervisors, 737 F.2d 155 (2d Cir. 1984), *cert. denied sub nom. Schmertz v. Nassau County Board of Supervisors*, 469 U.S. 1108 (1985). *Spring Realty* precludes reconsideration of Broadway's claims under the Due Process and Equal Protection clauses of the Fourteenth Amendment, the Takings Clause of the Fifth and Fourteenth amendments, and the Contract Clause of Article I, Section 10.

There is no merit to Broadway's contention that the Supreme Court's dismissal in *Spring Realty* may have been prompted by lack of ripeness. The state court decisions in *Spring Realty* rejected the pertinent constitutional claims on the merits and contain no suggestion that ripeness was an issue. Moreover, the claims of the plaintiffs in *Spring Realty* clearly were ripe for adjudication. The allegations in their complaint, which were repeated in their jurisdictional statement, make clear that they owned buildings subject to the regulation of the Loft Law at the time of suit. Contrary to appellant's contention, the City's Motion to Dismiss or Affirm, filed in opposition to the jurisdictional statement in *Spring Realty*, does not defend on grounds of prematurity but instead asserts the validity of the Loft Law on its merits. One sentence of that document uses the word "speculations" in response to the *Spring Realty* appellants' claim that the Cost of repairs will precipitate losses to the landlords. Neither that sentence nor the document as a whole can be read to contend that the challenge to the allegedly unconstitutional provisions of the statute is premature.

Broadway's remaining contentions are that the Loft Law violates the Bill of Attainder clause of Article I, § 10, and impairs its "vested property right" in the commercial certificate of occupancy that 640 Broadway was issued under the pre-Loft Law zoning regulations. For the reasons set forth in Judge Conboy's opinion, these arguments lack merit.

The judgment of the District Court is affirmed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

640 BROADWAY RENAISSANCE COMPANY,	:	
Plaintiff,	:	
	:	88 Civ. 6288 (KC)
- v -	:	**OPINION AND ORDER***
MARIO CUOMO, as Governor of The State of New York, *et al.*,	:	
Defendant.	:	

APPEARANCES:

For the plaintiff:

Fischbein Badillo
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New York, New York 10022
By: Kenneth G. Schwartz, Deborah J. Loctizer and David M. Slater, Esqs.

For the City defendants:

Peter L. Zimroth
Corporation Counsel
100 Church Street
New York, New York 10007
By: Gabriel Taussig, Albert Fredericks, and Catherine B. McAlevey, Esqs.

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* This is a corrected version of the Court's Opinion and Order dated July 2, 1990.

For the defendant Governor:

Robert Abrams
Attorney General of the State of New York
120 Broadway
New York, New York 10271
By: Dennis J. Saffran, Esq.

Kenneth Conboy, District Judge:

BACKGROUND

This case concerns "640 Broadway" a loft building located in an area of Manhattan north of Houston Street known as NOHO. Plaintiff, the owner of the building, has brought this action pursuant to 42 U.S.C. § 1983 to challenge the constitutionality of Article 7-C of the New York State Multiple Dwelling Law, commonly known as the "Loft Law," N.Y. Multiple Dwelling Law §§ 280-87 (McKinney Supp. 1989), on various grounds.

The Honorable John Walker, formerly a judge of this Court and now a member of the United States Court of Appeals for this Circuit and to whom this case was previously assigned, wrote a comprehensive opinion dismissing the pendent state law claims against the twenty-three individually named tenant defendants. *640 Broadway Renaissance Co. v. Cuomo*, 714 F. Supp. 686 (S.D.N.Y. 1989). The factual background of the litigation was fully set forth in that opinion and, thus, we will not repeat the facts here, save for those necessary to add context. The remaining defendants are the governmental defendants: the Governor of the State of New York, the former Mayor of the City of New York, and the members of the New York City Loft Board, an entity established by the contested legislation charged with the duty of enforcing the law and overseeing the conversion of certain lofts from commercial to residential use. We will refer to the Mayor and the Loft Board defendants collectively as the "City defendants."

In June 1982, in response to the illegal conversion of many New York City loft buildings from commercial to residential uses, the New York State Legislature enacted the Loft Law. As stated in section 280 of Article 7-C, the legislative findings section, the Law's purpose is to preserve residential housing and to effectuate legalization of loft units which had been previously converted from commercial to residential use without compliance with the New York City building codes and zoning resolutions. The Loft Law requires owners to bring affected buildings into compliance with previously ignored building codes, with much of the costs being passed on to the tenants in the form of temporary rent adjustments. An owner who might suffer unjustifiable hardship because of legalization costs was given an opportunity to gain an exemption from the Loft Law by filing a hardship application with the New York City Loft Board within nine months of passage of the law.

By order dated April 28, 1988, the Loft Board determined that 640 Broadway was an "interim multiple dwelling" as described in section 281 of Article 7-C, and therefore, subject to the provisions of Article 7-C. Once a building is determined to be an "interim multiple dwelling", the owner is required to effect the legal conversion of the property by performing certain acts within the time table set down by the law.

Plaintiff complains that the law has "numerous confiscatory effects" and thus, that the law is constitutionally infirm. Specifically, in Counts 1 through 9 of the complaint the plaintiff alleges the following constitutional violations: (1) that the Loft Law, in conjunction with other related state and city laws effects a taking of private property for public use without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution [Counts 1, 2, 4 and 5]; (2) and that in violation of the Fourteenth Amendment, the Loft Law deprives the plaintiff of liberty and property

without due process of law, and denies the plaintiff the equal protection of the law [Counts 6, 7 and 8]; and (3) that in violation of Article I, Section 10 of the United States Constitution, the Loft Law causes a substantial impairment of the obligation of contracts [Count 3] and (4) that the Law constitutes an unlawful Bill of Attainder [Count 9]. The complaint seeks declaratory, injunctive and monetary relief from the defendants for these constitutional violations.

Plaintiff now moves for summary judgment on each of these constitutional claims. The City defendants have cross moved for summary judgment on essentially two grounds: (1) that because the United States Supreme Court rejected nearly all of the plaintiff's claims in a different case, the claims must be dismissed; and (2) that if the Court were not to dismiss the claims, it must find that Article 7-C is constitutionally valid as it represents a reasonable exercise of the state's legislative authority.

In addition, Governor Cuomo has moved pursuant to Rule 12(c) of the Federal Rules of Civil Procedure to dismiss on two grounds.[1] First, he contends that he is not a proper defendant in the action. Second, he joins in the City defendants' contention that the complaint fails to state a cause of action against the constitutionality of the challenged state statute. We note that the second branch of the Governor's motion is analyzed in more explicit, and exquisite, detail than the corresponding section of the City's motion. The Governor argues that we need not, and indeed, must not independently decide the constitutionality of the law "in view of the binding

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[1] Because plaintiff, the City defendants, and indeed, the Governor, have presented material outside the pleadings, and because we have not excluded such material for the reasons elaborated upon at pages 7 - 12 of the text, we will treat the Governor's motion as one for summary judgment. To do so would not be prejudicial to any party as all have had the opportunity to address such material and present other materials.

precedential effect" of *Spring Realty Co. v. New York City Loft Board*, 127 Misc.2d 1090, 487 N.Y.S.2d 973 (Sup. Ct. N.Y. Co. 1985), *aff'd*, 117 A.D.2d 1029, 498 N.Y.S.2d 241 (1st Dep't 1986), *aff'd as modified on other grounds*, 69 N.Y.2d 657, 511 N.Y.S.2d 830, 503 N.E.2d 1367 (1986), *appeal dismissed for want of a substantial federal question*, 482 U.S. 911, 107 S. Ct. 3179 (1987), and "the need to discourage repetitive litigation commenced in violation of the principle of stare decisis." Governor Cuomo's Memorandum of Law in Support of His Cross Motion For Judgment on the Pleadings ("Governor's Main Mem.") at 30 n. 10. With respect to those claims not raised in *Spring Realty*, the Governor claims they are meritless as a matter of law and that therefore, they must be dismissed. We agree with the second branch of the Governor's motion for the reasons elaborated upon below.[2]

ANALYSIS

Although the constitutionality of the Loft Law was previously upheld in *Spring Realty*, plaintiff's initial 68-page memorandum of law nonetheless relegates this case to a single footnote. Plaintiff's Memorandum of Law in Support of its motion for Summary Judgment ("Pltf. Main Mem.") at 21 n.6. In this footnote, plaintiff conclusorily claims that *Spring Realty* "present[s] [no] barrier to this action. The constitutional challenges to the Loft Law both facially and as applied to this plaintiff are substantially different than those raised in *Spring Realty*." *Id.*

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[2] In light of our disposition of the matter, we do not reach the question of whether the Governor is a proper defendant in the action. Nor do we address the merits of the claims as the City defendants have in the second branch of their motion.

The defendants assert that we, as a federal court, are bound by the Supreme Court's dismissal of the *Spring Realty* appeal "for want of a substantial federal question." They further state that a comparison of the arguments presented to the United States Supreme Court in *Spring Realty* with those made by plaintiff here reveals that they are for the most part precisely the same, and indeed are often phrased in nearly identical language. As to those claims that were not decided in *Spring Realty*, the bill of attainder and the "vested property right" claims, defendants contend that they are meritless, even bordering on frivolous.

Defendants are correct regarding the precedential effect of a Supreme Court dismissal for want of a substantial federal question. In the seminal case of *Hicks v. Miranda*, 422 U.S. 332, 95 S. Ct. 2281 (1975), the plaintiffs therein challenged the constitutionality of California's obscenity statute, and a three judge federal district court held the statute to be unconstitutional. Several weeks later, in *Miller v. California*, 418 U.S. 915, 94 S.Ct. 3206 (1974) (Miller II), the Supreme Court dismissed "for want of a substantial federal question" the appeal from a California state court decision sustaining the constitutionality of the same statute. The *Hicks* defendants thereupon moved for reconsideration in the district court. The district court denied this motion, holding that it was not bound by the Supreme Court's dismissal of the *Miller II* appeal, and reaffirming its previous ruling that the statute was unconstitutional.

The Supreme Court chastised the district court for this holding:

> [T]he District Court was in error in holding that it could disregard the decision in *Miller II*. That case was an appeal from a decision by a state court upholding a state statute against federal constitutional attack. A federal constitutional issue was properly presented, it was within our

> appellate jurisdiction under 28 U.S.C. § 1257(2), and we had no discretion to refuse adjudication of the case on its merits as would have been true had the case been brought here under our certiorari jurisdiction. We are not obligated to grant the case plenary consideration, and we did not; but we were required to deal with its merits. We did so by concluding that the appeal should be dismissed because the constitutional challenge to the California statute was not a substantial one. The three-judge court was not free to disregard this pronouncement. . . ."[V]otes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case. . ," [citations omitted]. The District Court should have followed the Second Circuit's advice, first, in *Port Authority Bondholders Protective Committee v. Port of New York Authority*, 387 F.2d 259, 263 n. 3 ([2d Cir.] 1967), that "unless and until the Supreme Court should instruct otherwise, inferior federal courts had best adhere to the view that if the Court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise"; and, later, in *Doe v. Hodgson*, 478 F.2d 537, 539 [2d Cir.], *cert. denied*, 414 U.S. 1096 (1973), that the lower courts are bound by summary decisions by this Court " 'until such time as the Court informs [them] that [they] are not.' "

422 U.S. at 343-45.

Thus, while it is true that a summary affirmance or a summary dismissal for want of a substantial federal question is not of the same influence and impact as a signed opinion, *Edelman v. Jordan*, 415 U.S. 651, 671 (1974), such summary decisions are nevertheless decisions approving the merits. *Hicks, supra*, 422 U.S. at 344. *Spring Realty*, like *Miller II*, was an appeal from a state court decision upholding a state statute against federal constitutional attack, and was thus within

the Supreme Court's obligatory appellate jurisdiction under 28 U.S.C. § 1257(2).[3] See *Spring Realty Co. v. New York City Loft Board*, Jurisdictional Statement (U.S. Sup. Ct. Mar. 12, 1989) (attached as Appendix to the Governor's Main Mem.) at 2.[4] The Court's summary dismissal of the appeal in *Spring Realty* is therefore as binding upon this court in the present case as its summary dismissal of the *Miller II* appeal should have been upon the district court in *Hicks*.

The next question we must examine is just what binding effect *Spring Realty* is entitled to. Although the *Hicks* court relegated discussion of the exact scope of the summary dismissal's effect on a subsequent case to a footnote, 422 U.S. at 345 n.14, the Court, a few years later, focused on the parameters of such dispositions as set out in footnote fourteen of *Hicks, see Mandel v. Bradley*, 432 U.S. 173 (1977), (per curiam), and, in doing so, gave the lower federal courts instruction on how to "[a]scertain the reach and content of summary actions." *Hicks*, 422 U.S. at 345 n.14.

The Court stated that:

> [b]ecause a summary affirmance is an affirmance of the judgment only, the rationale of

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[3] Effective September 25, 1988, 28 U.S.C. § 1257 was amended, *inter alia*, such that there is no longer an appeal as of right where the constitutionality of a state statute is drawn in question as there was at the time of *Spring Realty*. Accordingly, all such cases may now be reviewed by the Supreme Court by writ of certiorari only, with a denial thereof, as in all denials of certiorari, having no precedential force. 28 U.S.C.A. § 1257, D. Siegel, *Commentary on 1988 Revision* at 42-43 (Supp. 1990). Contrary to plaintiffs assertion, there is nothing to indicate that *Hicks* and its progeny are not still good law with respect to summary dismissals of appeals brought as of right prior to the amendment of section 1257.

[4] We will cite to the *Spring Realty* jurisdictional statement as "Jur. St."

> the affirmance may not be gleaned solely from the opinion below. . . .Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions.

Mandel, 432 U.S. at 176. *Accord Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 182 (1979) (summary affirmance has no precedential effect with respect to issue not presented in appellant's jurisdictional statement). Thus, the precedential effect of a summary affirmance extends only to the issues presented to the Court and actually and necessarily decided by the lower courts. *Mandel, supra.* The Supreme Court has cautioned, however that "questions which 'merely lurk in the record' are not resolved, and no resolution of them may be inferred." *Socialist Workers, supra,* 440 U.S. at 183.

It is, therefore, clear that we must, at the very least, carefully examine the appellant's jurisdictional statement in order to ascertain which specific challenges were presented to and, thus, decided by the Supreme Court. *See League of Women Voters v. Nassau County Board of Supervisors,* 737 F.2d 155 (2d Cir. 1984), *cert. denied,* 469 U.S. 1108 (1985): *Delta Air Lines, Inc. v. Kramarsky*, 650 F.2d 1287, 1295 (2d Cir. 1981), *aff'd in part and vacated in part,* 666 F.2d 21 (2d Cir. 1981), *aff'd in part. vacated in part and remanded sub nom., Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 103 S. Ct. 2890 (1983). The Governor contends that we may look only to the jurisdictional statement. Plaintiff asserts that, in addition to examining the jurisdictional statement, we must also look at the opinions and at the actual documents which form the litigation record to determine whether the precise issues as stated in the jurisdictional statement "were necessarily decided in the prior

court opinions." Plaintiff's Reply Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment and In Opposition to Defendant's Cross Motions ("Pltf. Reply Mem.") at 16. In other words, plaintiff claims that we are to ascertain whether "the facts of the case plainly reveal a basis for the lower court's decision more narrow than the issues listed in the jurisdictional statement" *see Hardwick v. Bowers*, 760 F.2d 1202, 1203 (11th Cir. 1985), *rev'd on other grounds*, 478 U.S. 186 (1986), and, if so, we should assume that the "Supreme Court decided the issue on that narrow ground." *Id.* The rationale underlying this conclusion in *Hardick* was that "if the jurisdictional statement could expand a summary affirmance beyond the scope of issues necessarily decided, it would give the litigants considerable control over the scope of summary dispositions." *Id.* at 1208.

As counsel for the Governor has suggested, this rationale, although superficially appealing, is analytically flawed, as it implies that looking to the juri. dictional statement allows *both* litigants, including the appellee, whose interest is to ~~expand the~~ scope of the decision, the opportunity to influence this scope. In fact, as the Governor points out, "use of the jurisdictional statement places such 'control' only in the hands of the appellant, whose interest is of course to keep the scope of the decision as narrow as possible should its appeal be rejected, and the appellant exercises this 'control' not by fiat but by placing issues before the Supreme Court for review." Governor's Reply Memorandum of Law in Support of His Cross-Motion for Judgment on the Pleadings ("Governor's Reply Mem.") at 9 n.4. Nonetheless, we believe that the conclusion, that we should look to the underlying opinion and record in addition to the jurisdictional statement, is sound.

Although the two cases on this issue in our circuit have looked to the jurisdictional statement to "ascertain the reach and content of the summary action" one of them, *League of Women Voters, supra*, 737 F.2d at 168-69, did suggest that in order to

determine the issues "fairly comprised" within the jurisdictional statement, in accordance Supreme Court Rule 15.1(a), a court might look at the other documents in the record of the earlier litigation. Indeed, in that case, the Second Circuit used the underlying documents in the record to determine that a particular issue was "fairly comprised" within the jurisdictional statement such that the summary adjudication was controlling on that issue. *League of Women Voters,* 737 F.2d at 168-172. In so doing, the court adopted the reasoning of another court that " '[a] summary disposition has precedential value in cases virtually indistinguishable from the case summarily disposed of . . . and in cases involving . . . slightly different facts and issues. . . .' " *Id.*, 737 F.2d at 170 (quoting *Bangor Baptist Church v. Maine,* 549 F. Supp. 1208, 1219 (D.Maine 1982); *see also Delta Air Lines, supra,* 600 F.2d at 1295 (issue precluded if "substantially similar" to the issue in the jurisdictional statement).

Thus, it can be said that the court in *League*, in utilizing the underlying documents to help determine the "reach and content" of the summary adjudication, relied on such documents to give a more comprehensive reach to the summary disposition than that evident from the fact of the jurisdictional statement. We do not see why, contrary to the assertion of the Governor, such documents cannot be used to demonstrate that an issue is not fairly comprised within the jurisdictional statement, that is, to show that the jurisdictional statement overstates the issues that were actually presented to and decided by the lower court. *See Socialist Workers, supra,* 440 U.S. at 183 (no precedential effect of issues merely lurking in the record). We also see no reason why we should not look at the lower court opinions, although the Governor asserts that we should not, stating that the Supreme Court in *Mandel* took "great pains to dissociate" the jurisdictional statement from the opinion. Governor's Reply Mem. at 7. While the Supreme Court in *Mandel* did say that the rationale of a summary affirmance may not be gleaned solely from the opinion below,

it did not say that the jurisdictional statement is to be looked at exclusively or that we may not look to the opinions at all.

Despite the fact that it was plaintiff who argued that we must look to the underlying record in addition to the jurisdictional statement, our decision to do so does not really aid the plaintiff here, as it has failed to provide the careful analysis of the documents necessary to show that the issues as set out in the jurisdictional statement are broader than what was actually presented to and decided by the New York Courts. Indeed, save for one issue addressed in its sur-reply memorandum, the so-called "*per se* taking" argument, plaintiff makes little use of the documents. We will approach the issues raised in plaintiff's complaint and moving memorandum which are potentially precluded by *Spring Realty* in the following order: the due process arguments, the equal protection contentions, the Contract Clause arguments and finally the "takings" claims. We will then discuss the other two issues which the defendants concede were not raised in *Spring Realty:* the contention that plaintiff had a "vested right" in the City's pre Loft Law zoning regulation and the bill of attainder claim.

A. Claims Potentially Precluded By *Spring Realty*

1. Due Process Claims

In Point III(A) of its memorandum, plaintiff claims that the Loft Law exceeds the reach of the State's police power to regulate the use of private property, and thus violates the Due Process Clause. A similar due process claim was advanced in *Spring Realty*, *see* Question Presented 2, Jur. St. at ii; Jur. St. at 11-17; *see especially id.* at 17 ("present action offers this Court the opportunity to announce criteria" governing reach of "police power"), and squarely decided by both the Supreme Court and the New York courts.

Crucial to the present plaintiff's due process argument is the claim that loft owners had a reliance interest in the

unregulated commercial development of their property. Pltf. Main Mem. at 52. Precisely the same "expectation interest" argument was made by the *Spring Realty* appellants:

> [A] huge economic value has been taken from the owners, constituting an interference with their economic expectations that upon expiration of all leases, they would have vacant buildings which could be remodeled, demolished, sold or otherwise disposed of as the owners might desire.
>
> It has become impossible for owners to reap commercial returns . . . or sell the buildings for commercial development. Under the guise of an exercise of the police power, the statute forces the owner to assume the cost of providing a benefit to the "public" without recoupment.

Jur. St. at 18.

Plaintiff here also argues that the Loft Law violates due process because of the expiration of the hardship exemption of Multiple Dwelling Law § 285(2). Pltf. Main Mem. at 52-53. Incredibly, plaintiff argues that this argument was not made to the Supreme Court, *see* Pltf. Reply Mem. at 30-33, and that, in any event, the facts are different here because the hardship provision had not expired when the *Spring Realty* case was commenced but it had when this case was commenced. In fact, the hardship exemption had expired prior to the commencement of *Spring Realty, see* Jur. St. at 3. Moreover, the *Spring Realty* appellants specifically called the Supreme Court's attention to the expiration of this provision, arguing that, as a result, "it is impossible for a new or a late registrant or an owner undergoing changed circumstances to file for a hardship." Jur. St. at 14. Nonetheless, the Court rejected their

due process claim, and, accordingly, the claim must be rejected again here.[5]

2. Equal Protection Claim

In Counts 6, 7 and 8 of the complaint, the plaintiff contends that the Loft Law violates the equal protection clause of the Fourteenth Amendment which provides that no state shall "deprive any person . . . the equal protection of the laws." We note preliminarily that "Question Presented No. 3" in the jurisdictional statement broadly requests that the Court decide whether the Loft Law "constitutes a denial of equal protection of the laws." In its moving brief, plaintiff here likewise broadly states for its Point IV that the "Loft Law deprives [it] of equal protection of the law." Pltf. Main Mem. at ii. The facial similarity of the point headings is not all though; the specific substantive arguments made in the plaintiffs' memorandum and in the body of the *Spring Realty* appellants' jurisdictional statement are also strikingly similar.

For example, the essence of plaintiff's equal protection claim is that:

> There was simply no rational basis . . . for treating the owners of commercial loft buildings located in certain zoning districts which contained three or more residential tenants during the retroactive and arbitrarily selected sixteen month period from April 1, 1980 through December 1, 1981, differently from the owners of other commercial loft buildings.

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[5] Under a due process rubric, plaintiff also presented its novel argument that it had acquired a vested right in the City's pre-Loft Law zoning regulations so as to preclude a change in the law. This argument will be addressed in a later section of this opinion [pages 28-31].

Pltf. Main Mem. at 57-58. In almost identical language, the equal protection section of the *Spring Realty* jurisdictional statement begins:

> There is no rational basis for treating owners of buildings containing three or more residential units during the "window" period from 1980 to 1981 differently from other owners of property in the City of New York, whether commercial or residential.

Jur. St. at 20.

The present plaintiff's memorandum elaborates upon this argument as follows:

> [T]he statute requires the owners of the targeted loft buildings to assume the economic burden of housing and subsidizing artists, a burden that should be, if at all, borne by the public at large. Additionally, the statute creates a special class of loft building owners, and imposes staggering economic and legal obligations on them that are not imposed on other commercial property owners.

Pltf. Main Mem. at 58. The *Spring Realty* jurisdictional statement elaborated as follows:

> Article 7-C has as its real purpose the protection of a particular class and not the general public. Thus, the statute in effect protects one class of citizens against another, at the expense of that other class. Although appellants are not substantially different from other owners of commercial buildings in the City of New York, Article 7-C singles them out for treatment in an arbitrary manner.

Jur. St. at 20.

The plaintiff herein, observing that only loft buildings covered by the Loft Law are subject to rent control, while other loft buildings are not, argues that surely this classification is irrational. Pltf. Main Mem. at 58-59. The *Spring Realty* appellants made the same argument:

> [O]wners affected by Article 7-C are discriminated against because, unlike other commercial property owners similarly situated, they are forced to subsidize the rentals of their tenants; the Article impermissibly introduces a form of commercial rent control.
>
> . . . No other class of private real property owners within the state is forced to subsidize commercial tenants nor to accept commercial rentals at reduced, regulated rates pursuant to a rent regulation scheme.

Jur. St. at 20.

We have carefully examined the opinions in *Spring Realty* and the underlying record as submitted to us, and conclude that the jurisdictional statement does not overstate what was presented to and necessarily decided by the New York courts. Accordingly, we are left with the inescapable conclusion that all of plaintiff's equal protection arguments were disposed of by the Supreme Court's summary dismissal in *Spring Realty*, and thus cannot be reargued here.

3. Contract Clause Claim

In Point V of its memorandum, plaintiff claims that the Loft Law unconstitutionally impairs the obligation of private contracts by superceding the provisions of the Loft Leases in violation of Article I, Section 10 of the United States Constitution. Plaintiff unsuccessfully argues that *Spring Realty* has no precedential effect here as "the factual setting and the terms, contents and conditions of the plaintiff's leases are

totally different than the *Spring Realty* Leases." Pltf. Reply Mem. at 39. To support this claim, plaintiff has submitted a copy of the commercial Loft Lease used for the 640 Broadway tenants. This lease is a standard form lease with several riders.

It is quite clear that the New York Courts considered and adjudicated the claim that the Loft Law impaired the obligation of private contracts by overriding the fundamental terms of the Loft owners' commercial leases — specifically including those terms relating to residential use, term of occupancy, eviction, rent, heat and other services, and subletting and assignment. Contrary to the plaintiff's assertion, every single provision of the lease need not have been itemized for the state courts; it is beyond question that the courts were considering the effect on the leases as a whole. It is also clear that these same arguments were presented to the Supreme Court in the jurisdictional statement. Jur. St. at 21-22. Indeed, plaintiff's memorandum of law with respect to these claims resembles in large part the jurisdictional statement. *Compare* Pltf. Main Mem. at 63-64 *with* Jur. St. at 20-21. For example, plaintiff concludes that the Loft Law "grants the equivalent of life-estates to the occupants" "by transforming a short-term commercial lease into a perpetual residential tenancy." Pltf. Main Mem. at 64. The phrase used in the *Spring Realty* jurisdictional statement was that the Law "gives tenants a virtually unlimited term of occupancy for any residential and/or commercial purpose." Jur. St. at 21.

Accordingly, the Supreme Court having rejected the Contract Clause claim made by the *Spring Realty* appellants and the plaintiff's claim being virtually identical thereto, we are obliged not to readjudicate the merits of the issue.

4. The Takings Clause Claims

Plaintiff argues that the Loft Law imposes unreasonably burdensome obligations and deprives it of certain fundamental

property rights, thereby effecting a taking of the building without just compensation in violation of the Fifth and Fourteen Amendments. Plaintiff posits the alleged violations in three ways: that the Loft Law effects (l) a *per se* taking of the building itself; (2) a *per se* taking of the plaintiff's interest in the fixtures and improvements added by the tenants to the lofts; and (3) a regulatory, or *de facto*, taking of the building.

In its reply memorandum, plaintiff apparently concedes that the regulatory taking argument was presented to and adjudicated by both the New York courts and the Supreme Court. *See* Pltf. Reply Mem. at 21-24. Accordingly, we are bound by the preeedential effect of the Supreme Court's summary dismissal in *Spring Realty* and will not consider anew the argument of a regulatory taking.

The Governor argues that plaintiff's *per se* takings claims were also previously adjudicated, a contention that plaintiff hotly disputes. It is clear, however, that the *per se* taking argument was unambiguously made by the *Spring Realty* appellants in their jurisdictional statement. *See* Jur. St. at 18-19. Citing *Hall v. City of Santa Barbara*, 797 F.2d 1493 (9th Cir. 1986) [*amended*, 833 F.2d 12 (9th Cir. 1987)], *cert. denied*, 485 U.S. 940 (1988), the *Spring Realty* appellants declared that the Supreme Court was "presented with the opportunity to decide the issue of whether Article 7-C presents a . . . taking case . . . involving the physical occupation of property", and argued that the Loft Law, like the ordinance at issue in *Hall*, effects a *per se* taking by "transfer[ring] a possessory interest in the buildings to the tenants." Jr. St. at 18, 19. Plaintiff here makes exactly the same argument in Point I(B) of its moving memorandum. In its reply and sur-reply memoranda, plaintiff acknowledges that the *Spring Realty* appellants included this argument in the jurisdictional statement, but charges that it was made in an "attempt to enlarge the scope of their 'taking' claim." *See* Plaintiff's Supplemental Memorandum of Law in Support of its Motion

for Summary Judgment and in Opposition to the Defendants Cross-Motions ("Pltf. Supp. Mem.") at 8. Plaintiff contends that the *per se* taking argument was never raised in any of the state courts, and therefore, that the issue could not properly be decided on an appeal to the United States Supreme Court. Thus, to the plaintiff, the jurisdictional statement exaggerates the issues actually decided by the state courts.

To support this argument, plaintiff points to certain pages of the *Spring Realty* appellants' brief to the New York Court of Appeals, which plaintiff admits contain a "completely garbled" takings analysis, *see* Pltf. Supp. Mem. at 8, but which, plaintiff nonetheless argues, present only a regulatory taking argument. We agree that the argument in the brief appears to focus primarily on a regulatory taking. We observe, however, that the plaintiff did not submit for our review any of the *Spring Realty* appellants' other briefs to the lower courts or the responses thereto by the governmental defendants. Thus, we are unable to ascertain from the plaintiff's submissions to us whether the *per se* taking argument was made earlier in the litigation and essentially dropped on appeal because those appellants felt it was less weighty than their other arguments, or whether it was never made at all.

Our examination, however, of the trial court's opinion and the cases cited therein persuades us that the *per se* taking argument was, in fact, made in and rejected by the lower court. *Spring Realty Co. v. New York City Loft Board,* 127 Misc.2d 1090, 1093-94, 487 N.Y.S.2d 973, 976 (Sup. Ct. N.Y. Co. 1985). Indeed, the first factor of the analysis for a regulatory taking is the same as the entire analysis employed to determine whether a *per se* taking has occurred: the court must look at the "character of the government action." *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124 (1978); *accord Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). Where regulatory takings are alleged, the court must also look at whether the state seeks

to further legitimate interests by the enactment of the law and whether the "mere enactment" of the law has deprived the claimant of all beneficial, economically viable use of its property. *Keystone Bituminous Coal Ass'n v. De Benedictis*, 480 U.S. 470, 485, 493 (1987); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). Because the trial court went on to consider the other two factors of the takings analysis, it is plain that it did not consider the character of the government action to constitute a physical invasion by the government, but rather that it found that the law could only be construed as a restriction on the use of the property. Accordingly, we conclude that the issue of whether there was a physical invasion of the property was actually and necessarily decided by the lower court. We thus reject the plaintiff's contention that the jurisdictional statement is overstated, and we find that the issue of *per se* taking was properly presented to and directly rejected by the Supreme Court.

We now reach plaintiff's last argument as to why we should decide the merits of the takings issue: that "doctrinal developments" since the Supreme Court's summary dismissal of the *Spring Realty* appeal have undermined its precedential value. *See Hicks, supra,* 422 U.S. at 344. The cases cited by the plaintiff for this proposition, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304 (1987) and *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987), were decided, respectively, just one day and just three weeks after the Supreme Court's dismissal of the *Spring Realty* appeal. Thus, one could hardly call these "developments." The third case cited for this proposition, *FCC v. Florida Power Corp.,* 480 U.S. 245 (1987) was decided four months prior to *Spring Realty,* and, therefore, certainly can not be labelled a "development." In its reply brief, but not in the doctrinal developments section thereof, plaintiff also discusses a recent New York Court of Appeals case, *Seawall Associates v. City of New York,* 74 N.Y.2d 92, 544 N.Y.S.2d 542, 542 N.E.2d

1059, *cert. denied*, 110 S.Ct. 500 (1989). In that case, the court declared unconstitutionally invalid the New York City Single Room Occupancy Law. The Supreme Court denied the City's petition for a writ of certiorari. *Seawall* does not constitute a "doctrinal development" for two reasons: because denials of certiorari have no precedential force, *see supra* at 6-7 and footnote 3; and because the decision of the New York Court of Appeals, or of any other court other than the United States Supreme Court is not a "doctrinal development" within the meaning of *Hicks v. Miranda. Hicks, supra*, 422 U.S. at 344; *see Soto-Lopes v. New York City Civil Service Commission*, 755 F.2d 266, 272 (2d Cir. 1985) (the summary affirmance "constitutes binding precedent for the present case unless . . . overruled, explicitly or implicitly, by a subsequent Supreme Court decision); *League of Women Voters v. Nassau County Board of Supervisors*, 737 F.2d 155, 172 (2d Cir. 1984), *cert. denied*, 469 U.S. 1108 (1985) ("The Supreme Court has not informed us otherwise — either indirectly or by doctrinal development.").

There being no doctrinal developments of which we are aware, and having concluded that the *per se* taking issue was presented not only to the Supreme Court but also to the New York courts, we are bound by the Supreme Court's rejection of the *Spring Realty* appeal and we therefore must decline the plaintiff's invitation to decide the issue of a *per se* taking anew.[6]

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[6] We observe that even if we were to decide the issue, the City Defendants' Memorandum in Support of its Cross-Motion for *Summary Judgment at pages 34 through 45 provides an excellent* analysis of why the Law is valid.

B. Other Claims

1. Bill of Attainder Claim

In Count 9 of its complaint, plaintiff alleges that the Loft Law constitutes an unlawful bill of attainder within the meaning of Article I, section 10 of the United States Constitution. Specifically plaintiff claims that the New York State Legislature has retroactively singled out a small group of property owners who operated commercial loft buildings in certain zoning districts in New York City, which lacked a residential certificate of occupancy on June 21, 1982, and which had been residentially occupied by three or more families during the statutory window period of April 1, 1980 to December 1, 1981.

Plaintiff contends that this is a narrowly defined and retroactively selected group of individuals within the meaning of the bill of attainder clause. Plaintiff further maintains that the legislature determined that this "easily ascertainable group was 'guilty' of unspecified crimes, and then inflicted punishment upon them" via the Loft Law without a judicial trial. Pltf. Main Mem. at 67. The so-called "punishment" inflicted by law is alleged to be the devastating economic hardship that will befall the plaintiff if it is forced to undertake conversion renovations. *Id.*

The plaintiff also asserts that "because the building is now subjected to the strictest rent control, its value is drastically diminished, and the plaintiff is forever stripped of his property rights in the fixtures and numerous other property rights." *Id.* The plaintiff states that these "economic burdens are further compounded by the confiscation of its property rights to decide the lawful use to which the building will be put; to choose its tenants, and to negotiate the terms of its leases, and to be subject to mandated capital expenditures at the whim of the City, State and the Loft Board." *Id.* Finally, plaintiff

contends that because the hardship exemption has expired, it has no statutory basis for avoiding compliance with the law, and therefore its "punishment" is "inescapable." *Id.* at 68.

The Supreme Court has described "the key features of a bill of attainder" as: [a] a law that legislatively determines guilt and inflicts punishment [b] upon an identifiable individual [c] without provision of the protections of a judicial trial." *Nixon v. Administrator of General Services,* 433 U.S. 425, 468 (1977), *quoted in Selective Service System v. Minnesota Public Interest Research Group,* 468 U.S. 841, 846-47 (1984). Whether the statute "inflicts punishment" within the meaning of the first factor entails a further three-part analysis:

> (l) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes'; and (3) whether the legislative record 'evinces a congressional intent to punish.'

Id. at 852 (quoting *Nixon, supra,* 433 U.S. at 473, 475-76, 478).

In applying this test, the courts have been exceptionally mindful of the dangers of an expansive reading of the Bill of Attainder Clause and have been extremely loathe to find a challenged statute constitutes a bill of attainder. As stated recently by Chief Judge Munson of the Northern District of New York:

> Of course, all modern legislation regulating the economic activities of specific groups might be considered 'punishments,' and the bill of attainder clause, if read too broadly, could be used to cripple the ability of legislatures to respond to some perceived social or economic problem by imposing restrictions or limitations on individuals, corporations, or

> industries which are deemed responsible for the problem. Consequently, the bill of attainder clause has been used sparingly in invalidating legislation. It has been applied only to legislation closely paralleling the historical characteristics of common law bills of attainder and bills of pains and penalties, the most important of which is a design to '[inflict[] its deprivation upon the members of a political group thought to present a threat to national security.' *United States v. Brown*, 381 U.S. 437, 453 (1965). . . . *The court is aware of only four cases decided by the Supreme Court since the Civil War in which a statute was invalidated under the bill of attainder clause, and all four involved legislative sanctions against perceived 'traitors' or 'subversives'.*

Long Island Lighting Co. v. Cuomo, 666 F. Supp. 370, 403 (N.D.N.Y. 1987) (emphasis added) (citations omitted).

Leaving aside for a moment the specificity element [factor b], it is plain that plaintiff has failed to show that the Loft Law constitutes "punishment" [factor a] as the term has been interpreted by the courts. "Punishment" will be found only where the statutory burden is ". . . so disproportionately severe and so inappropriate to nonpunitive ends . . ." that a legislative desire to punish can be discerned. *Nixon, supra,* 433 U.S. at 474. Where, on the other hand, the statutory burdens further legitimate, nonpunitive legislative purposes, the Bill of Attainder clause is not implicated. *Selective Service System, supra,* 468 U.S. at 852.

For example, *in* the *Nixon* case, former President Nixon challenged the Presidential Recordings and Materials Preservation Act, Pub.L. 93-526, 88 Stat. 1695 (note following 44 U.S.C. § 2111 [West Supp. 1989]), which applied exclusively to his presidential papers and placed restrictions upon his control of those papers that were not placed upon other former presidents. The Supreme Court held

that the Act did not constitute a bill of attainder, as neither the punishment nor the specificity elements were met. In holding that the Act did not "inflict punishment" upon Mr. Nixon, the Court emphasized that "[f]orbidden legislative punishment is not involved merely because the Act imposes burdensome consequences." 433 U.S. at 472. Applying the three-part test of punishment noted above, the Court found that "the Act imposes no punishment traditionally judged to be prohibited by the Bill of Attainder Clause", such as death, imprisonment, banishment, "punitive confiscation of property" or exclusion from practicing one's profession, *id.* at 475, 473-74; that the Act was reasonably related to the furtherance of non-punitive legislative purposes, *id.* at 475-78; and that there was no evidence in the legislative record of a Congressional intent to judicially punish Mr. Nixon, *id.* at 478-83.

Plaintiff, of course, has seized on the language "punitive confiscation of property," arguing that the Loft Law constitutes economic confiscation in the nature of punishment. We disagree, concluding that the legislation in issue is an example of economic regulation in today's complex world, and is rationally related to the legitimate and non-punitive legislative goal of providing safe and habitable housing. We also observe that plaintiff has not offered any evidence from the legislative record or elsewhere to support a claim of legislative intent to punish affected Loft owners.

Regarding the specificity element, the *Nixon* court found "the Act's specificity — the fact that it refers to appellant by name — does not automatically offend the Bill of Attainder Clause", as Mr. Nixon "constituted a legitimate class of one." 433 U.S. at 472-73. In reaching this conclusion, the Court stressed its unwillingness to use the Bill of Attainder Clause to police the classifications that are inherent to all legislation. The Court stated that:

> [Nixon] argues that . . . the Constitution is offended whenever a law imposes undesired

> consequences on an individual or on a class that is not defined at a proper level of generality. The Act in question therefore is faulted for singling out appellant, as opposed to all other Presidents or members of the Government, for disfavored treatment.
>
> [Nixon]'s characterization of the meaning of a bill of attainder obviously proves far too much. By arguing that an individual or defined group is attainted whether he or it is compelled to bear burdens which the individual or group dislikes, appellant removes the anchor that ties the bill of attainder guarantee to realistic conceptions of classification and punishment. His view would cripple the very process of legislating, for any individual or group that is made the subject of adverse legislation can complain that the lawmakers could and should have defined the relevant affected class at a greater level of generality. Further, every person or group made subject to legislation which he or it finds burdensome may subjectively feel, and can complain, that he or it is being subjected to unwarranted punishment. However expansive the prohibition against bills of attainder, it surely was not intended to serve as a variant of the equal protection doctrine, invalidating every Act of Congress or the States that legislatively burdens some persons or groups but not all other plausible individuals. In short, while the Bill of Attainder Clause serves as an important 'bulwark against tyranny,' it does not do so by limiting Congress to the choice of legislating for the universe, or legislating only benefits, or not legislating at all.

Id. at 469-71 (citations omitted).

As Justice Frankfurter stated in his concurrence in *United States v. Lovett*, 328 U.S. 303, 342 (1946), which was quoted with approval in *Nixon*, 433 U.S. at 470 n.32, and in

Selective Service System, 468 U.S. at 852 n.8, "[t]he fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed."

Accordingly, for all of the above reasons, we find that the Loft Law imposes only the sort of economic burdens that mark all regulatory legislation, that it furthers legitimate public goals which are well within the scope of the State's police power, and that there is no evidence of legislative intent to punish. The plaintiff's Bill of Attainder claim is therefore dismissed.

2. Vested Rights Claim

Plaintiff argues that it had a "vested property right" in the City's pre-Loft Law zoning regulations and the commercial certificate of occupancy issued thereunder, and that the State and the City were therefore prevented from duly amending these regulations in order to allow residential use of plaintiff's building. For this proposition, plaintiff cites a limited New York zoning principle articulated in *Lefrak Forest Hills Corp. v. Galvin*, 40 A.D.2d 211, 338 N.Y.S.2d 932 (2d Dep't 1972), *aff'd mem.* 32 N.Y.2d 796, 345 N.Y.5.2d 547, 290 N.E.2d 685 (1973), *cert. denied*, 414 U.S. 1004 (1973). In that case, the court held that "[a] vested right to finish a nonconforming building matures when substantial work is performed and obligations are assumed in reliance on a permit legally issued" for construction of the building prior to a zoning change making it a nonconforming use. 40 A.D.2d at 218, 338 N.Y.S.2d at 939. This doctrine is wholly inapposite here as it applies to a building undergoing construction at the time of a zoning change, and protects a builder who has performed "substantial work" on the building in reliance on the previous zoning classification. Plaintiff here is not constructing a building, and has proffered no evidence that it performed

"substantial work" in reliance upon the pre-Loft Law zoning regulations. Indeed, it is attempting to avoid performance of the work that coverage under the Loft Law would entail. Furthermore, we observe that plaintiff has entirely ignored the Governor's citation to the controlling case authority; plaintiff has not cited the general rule, but only the exception thereto.

The Second Circuit Court of Appeals, applying both Supreme Court and New York law, held that a property owner has no constitutionally protected property interest in an existing zoning classification. *Ellentuck v. Klein*, 570 F.2d 414 (2d Cir. 1978).

> Property interests are
>
> > 'of course . . . not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understanding [sic] that secure benefits and that support claims of entitlement to those benefits.' *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), quoted in *Paul v. Davis*, 424 U.S. 693, 709 (1976).
>
> Under New York law, the source of plaintiffs' property rights, a landowner has no vested right in the existing classification of his property. *Shepard v. Skaneateles*, 300 N.Y. 115, 89 N.E.2d 619 (1949).

Ellentuck, 570 F.2d at 429.

We have no doubt that the Second Circuit correctly applied New York law and that the analysis is dispositive of plaintiff's vested rights claim. Indeed, in the *Shepard* case, the New York Court of Appeals found that the rezoning of an owner's property from commercial to residential use did not

deprive the owner of any constitutionally protected rights. This holding was more recently reiterated by the New York's highest court in *McGowan v. Cohalan*, 41 N.Y.2d 434, 393 N.Y.S.2d 376, 361 N.E.2d 1025 (1977). There, the court stated:

> [B]oth courts below properly rejected appellant's contention that he possessed a vested right to the continuation of an industrial zoning classification. The simple application of a zoning classification to property does not create a right to forever be similarly so classified. 'Changed or changing conditions call for changed plans, and persons who own property in a particular zone or use district enjoy no eternally vested right to that classification if the public interest demands otherwise.'

Id. at 438, 393 N.Y.S.2d at 379 (quoting *Rodgers v. Village of Tarrytown*, 302 N.Y. 115, 121, 96 N.E.2d 731, 733 (1951)). *See also Alaimo v. Town of Greece*, 68 A.D.2d 743, 746, 418 N.Y.S.2d 492, 494 (4th Dep't 1979) (no eternally vested right to zoning classification); *Mackay v. Mayhall*, 92 Misc.2d 868, 871-72, 401 N.Y.S.2d 679, 682 (Sup. Ct. Suf. Co. 1977) (no vested right to the continuation of a particular provision of the zoning law); *Khare v. Village of Massapequa Park*, 62 Misc.2d 68, 70, 307 N.Y.S.2d 996, 999-1000 (Sup. Ct. Nas. Co. 1970) ("it is hornbook law that there is no vested right to the continuation of a particular provision of the zoning law"), *aff'd*, 35 A.D.2d 653, 314 N.Y.S.2d 357 (2d Dep't), *aff'd*, 27 N.Y.2d 991, 318 N.Y.S.2d 746, 267 N.E.2d 481 (1970); *Oriental Boulevard Co. v. Heller*, 58 Misc.2d 920, 928-29, 297 N.Y.S.2d 431, 441 (Sup. Ct. Kings Co. 1969) ("an owner of property who has maintained his property in compliance with laws then in existence acquires no vested right or immunity against an exercise of the police power which imposes additional or new requirements with respect to the maintenance or use of such property"), *modified on other grounds and aff'd as modified*, 34 A.D.2d 811, 311 N.Y.S.2d

635 (2d Dep't), *aff'd*, 27 N.Y.2d 212, 316 N.Y.S.2d 226, 265 N.E.2d 72 (1970), *appeal dismissed for want of a substantial federal question*, 401 U.S. 986 (1971).

In view of all of the foregoing well-settled authority, plaintiff's vested rights claim must be dismissed.

CONCLUSION

Because we are bound by the Supreme Court's summary dismissals, and because we have determined that the plaintiff's due process, equal protection, Contract Clause, and takings claims were previously presented to and adjudicated by both the New York state courts and the United States Supreme Court, and there being no major factual distinctions between the plaintiff herein and the *Spring Realty* appellants nor any doctrinal developments undermining *Spring Realty*, Counts 1 through 8 of the complaint must be dismissed. Although the Bill of Attainder and "vested rights" arguments were not previously presented to the Supreme Court, we conclude that they cannot state a claim as a matter of law, and, therefore, must also be dismissed. Consequently, the entire complaint must be dismissed and the Clerk of the Court is directed to enter judgment accordingly.

SO ORDERED.

/s/Kenneth Conboy
KENNETH CONBOY, U S.D. J.

Dated: New York, New York
July 2, 1990

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

640 BROADWAY RENAISSANCE CO.,

Plaintiff,

- against -

88 Civ. 6288(JMW)
Opinion and Order

MARIO CUOMO, as Governor of the State of New York, et. al.,

Defendants.

----------x

WALKER, District Judge:

In this action, brought pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343 (3), plaintiff asserts two groups of claims: (a) nine federal causes of action solely against individually named governmental defendants challenging the constitutionality of the "Loft Law" and; (b) thirty-six state claims for fraud and breach of contract against individually named tenant-defendants. The tenant-defendants have moved to dismiss the group (b) claims against them on the ground that these claims fail to state a cause of action under New York law and have moved for an order imposing Rule 11 sanctions. The Court agrees that the state law claims should be dismissed but for a different reason: lack of subject matter jurisdiction.

This Court, like all federal courts, has a "virtually unflagging obligation ... to exercise jurisdiction given to [it]." *Colorado River Water Conservation District v. United States,*

424 U.S. 800, 817 (1976). However, a federal court must first ensure that, in fact, it has jurisdiction. Federal subject matter jurisdiction may be raised at any time, and *must* be raised *sua sponte* by a federal court upon any indication that jurisdiction is lacking. *See, e.g., Hughes v. Patrolmen's Benevolent Association of the City of New York, Inc.*, 850 F.2d 876, 881 (2d Cir. 1988); Fed. R. Civ. P. 12(h)(3).[1] For the reasons stated below, the Court dismisses plaintiff's state law claims for lack of subject matter jurisdiction.

I. Background

This case concerns "640 Broadway," a loft building located in an area of Manhattan north of Houston Street known as "NOHO." The building was originally designated as a commercial building and residential use was forbidden under New York law. However, artists[2] began living in the building in the seventies. In fact, in 1978 the owner of the building was cited for violating zoning provisions by allowing the building to be used for residential use. Shortly thereafter, also in 1978, plaintiff 640 Broadway Renaissance Co. acquired the building.

The tenant-defendants contend that plaintiff knew that people were living in the building at the time plaintiff acquired it. Residents have testified that they informed plaintiff before they signed their leases that they planned to live in the building and that the owner gave assurances that such arrangements were acceptable. Still, all tenants signed commercial leases that

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[1] The Attorney General first raised the question of subject matter jurisdiction at oral argument on May 9, 1989. Plaintiffs have since had an opportunity to respond in writing.

[2] Plaintiff prefers to call them "so-called artists."

explicitly stated that they would only use the building for commercial purposes and would not reside on the premises.

In June, 1982, in response to the illegal conversion of many New York City loft buildings to residential uses, the New York State Legislature enacted Article 7-C of the Multiple Dwelling Law (the "Loft Law"). The Law's purpose is to preserve residential housing and to effectuate legalization of loft units which had been previously converted from commercial to residential use without compliance with the New York City building codes and zoning resolutions. The Loft Law requires owners to bring affected buildings into compliance with previously-ignored building codes. An owner who might suffer unjustifiable hardship because of legalization costs was given an opportunity to gain an exemption from the Loft Law by filing a hardship provision with the New York City Loft Board within nine months of passage of the Law.

Article 7-C establishes a comprehensive framework for legalization of buildings used for residential purposes during a sixteen month period between 1980 and 1981. Continued occupancy of the residential units in these buildings is permitted, and the owners are required to make various improvements and obtain residential certificates of occupancy for the units in accordance with set timetables. §283, §284. Legalization costs are to be passed along to the tenant in the form of temporary rent adjustments. §286[5]. During the legalization period, tenants are afforded basic protections available to residents of New York City. §286[11]. After a landlord brings a unit into compliance with applicable housing standards, the landlord must offer tenants residential leases. §286[3]. Landowners in compliance with the law are

authorized to recover back rent or possession of a unit for non-payment of rent.[3] §285[1].

Article 7-C also authorizes the establishment of a special governmental unit known as the Loft Board (the "Board"), to be made up of representatives of the public, the real estate industry, loft tenants and loft manufacturing interests. The Board is charged with the duty of enforcing Article 7-C. It is specifically authorized to determine issues of coverage under the laws and issue various regulations. §282. By order dated April 28, 1988, the Board determined that 640 Broadway is an "interim dwelling unit" subject to the provisions of Article 7-C.

In September, 1988, plaintiff initiated the present action. Counts one through nine of the Complaint allege in substance the following constitutional violations: (l) that the Loft Law, in conjunction with other related laws, effects a taking of private property for public use without just compensation in violation of the Fifth and Fourteenth Amendments; (2) that in violation of Article I, Section 10 of the United States Constitution, the Loft Law causes substantial impairment of the obligation of contracts and constitutes an unlawful Bill of Attainer; (3) that in violation of the Fourteenth Amendment, the Loft Law deprives the owner of liberty and property without due process of law, and denies the owner equal protection of the law.

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[3] The parties dispute exactly what a landlord must do to be "in compliance" under §285[1]. Plaintiff argues that the landlord would have to spend millions of dollars complying with a law that they believe to be unconstitutional in order to recover rent. Defendants argue the landlord need only register the building and provide minimal residential services, such as providing heat and hot water. This dispute is not presently before the Court.

In Counts 10 through 45 of the Complaint, plaintiff asserts allegedly pendent state law claims of fraud and breach of contract against the residential tenants of the building. These claims purportedly arise out of tenants' residential use of 640 Broadway in contravention of their leases and their refusal to surrender possession of their units at the expiration of these leases. Plaintiff argues that "this Court can and should exercise its pendent jurisdiction over the state law claims because those claims are based upon the same operative facts as are the federal claims and because the exercise of pendent jurisdiction over the nonfederal claims will promote judicial economy, convenience and fairness to the parties." Complaint ¶ 16. It is this group of state law claims with which the Court is concerned here.

II. Discussion

A. *Subject Matter Jurisdiction*

The concept of "pendent jurisdiction" has its origin in *United Mineworkers v. Gibbs,* 383 U.S. 715 (1966), in which the Supreme Court held that where there is federal jurisdiction over parties with both federal and nonfederal claims, a federal court has the constitutional power under Article II, Section 2 to adjudicate the non-federal portion of the dispute. Under this general doctrine, known as pendent-claim jurisdiction, a pendent non-federal claim is asserted against a defendant who is already subject to the jurisdiction of the federal court on a federal cause of action. In this case, however, there are no federal causes of action asserted against the tenant-defendants.[4] Thus, the only basis for exercising jurisdiction over the state

[4] Contrary to defendants' assertions in submissions to this Court, the constitutional claims are only against the governmental defendants, not the tenant-defendants. The Court rejects plaintiffs' argument that the tenant-defendants can be characterized as state actors.

claims is the doctrine of "pendent-party jurisdiction." *See generally* 13B Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction (2d ed.) § 3567.2 at 145-161. Under this theory, once a federal court has jurisdiction over a federal claim to which state claims may be appended, it may also assert jurisdiction over nondiverse parties against whom only the state claims are alleged.

The doctrine of pendent-party jurisdiction provides a much narrower basis for jurisdiction than the doctrine of pendant-claim jurisdiction recognized in *Gibbs*. As the Supreme Court explained in *Aldinger v. Howard*, 427 U.S. 1 (1976), in contrasting the two doctrines:

> [I]t is one thing to authorize two parties, already present in federal court by virtue of a case over which the court has jurisdiction, to litigate in addition to their federal claim a state-law claim over which there is no independent basis of federal jurisdiction. But it is quite another thing to permit a plaintiff, who has asserted a claim against one defendant with respect to which there is federal jurisdiction, to join an entirely different defendant on the basis of a state-law claim over which there is no independent basis of federal jurisdiction ... [T]he addition of a completely new party would run counter to the well-established principle that federal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress.

Id. at 14-15.

In *Aldinger v. Howard*, 427 U.S. 1 (1976), the Supreme Court noted that pendent-party jurisdiction may not offend Article III when the statutory grant of subject matter jurisdiction does not explicitly or implicitly negate the exercise of such jurisdiction. *Id.* at 18. In other words, if the statutory scheme in which the grant of jurisdiction appears excludes a particular party, the court may not exercise pendent-party

jurisdiction. *See e.g., Aldinger,* 427 U.S. 1 (1976) (municipal corporations excluded from liability under 42 U.S.C. § 1983, therefore no pendent-party jurisdiction under 28 U.S.C. § 1343);[5] *Owen Equipment & Erection Co. v. Kroger,* 437 U.S. 365 (1978) (no pendent-party jurisdiction under diversity grant, 28 U.S.C. § 1332(a)(1) for nondiverse parties). On the other hand, when Congress has neither expressly nor impliedly negated the exercise of jurisdiction, courts have at times been willing to exercise pendent-party jurisdiction. *See e.g., Bolton v. Gramlich,* 540 F. Supp. 822, 845-46 (S.D.N.Y. 1982) (pendent-party jurisdiction permissible when main claim based upon Securities Exchange Act of 1934).

The Supreme Court recently made explicit the nontransferability of *Gibbs* to the context of pendent-party jurisdiction. In *Barbara Finley v. United States,* __U.S.__, 57 U.S.L.W. 4557 (May 22, 1989), the Court refused to allow pendent-party jurisdiction in Federal Tort Claims Act (FTCA)[6] cases. Writing for the majority, Justice Scalia reasoned that the text of the FTCA — which provides in pertinent part that the federal district courts shall have jurisdiction over "civil actions on claims against the United States" — defines jurisdiction in a manner that does not reach defendants other than the United States and thus precludes courts from exercising jurisdiction over private parties, even though claims against such parties arise from a common nucleus of operative facts and trying such claims together would promote judicial economy and efficiency.[7] Citing *Aldinger, Zahn v. International Paper Co.,*

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[5] *Aldinger* preceded *Monell v. Dept. of Social Services,* 436 U.S. 658 (1978), which held that municipal corporations are subject to § 1983 liability.

[6] 28 U.S.C. § 1346(b).

[7] The Supreme Court found the unavailability of jurisdiction over the additional state law claims to be unaltered by the exclusivity of federal

(Footnote continued)

414 U.S. 291 (1973), and *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978), Justice Scalia observed, "Our cases show ... that with respect to the addition of parties, as opposed to the addition of only claims, we will not assume that the full constitutional power has been congressionally authorized, and will not read jurisdictional statutes broadly." __U.S. at __ , 57 U.S.L.W. at 4558. Justice Scalia concluded that all of these cases "have held that a grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different parties." __U.S. at __, 57 U.S.L.W. at 4560.

Thus, in determining whether this Court has jurisdiction over the tenant-defendants, the Court must undertake a three-tiered analysis. First, it must determine whether it has the Article III power to exercise jurisdiction over the claims. *United States Mine Workers v. Gibbs*, 383 U.S. 715 (1966). Second, it must determine whether Congress in the statutes conferring jurisdiction has not expressly or by implication negated the existence of jurisdiction. *Aldinger v. Howard*, 427 U.S. 1 (1976); *Barbara Finley*, __ U.S. at __, 57 U.S.L.W. at 4558.[8] Third, it must decide whether as a matter of discretion the power to exercise jurisdiction should be exercised. *Gibbs*, 383 U.S. at 726.

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jurisdiction under the FTCA, even though that may sometimes require separate suits in state and federal court. ___ U.S. at __, 57 U.S.L.W. at 4559.

[8] *See also Owen Equipment & Erection Co.*, 437 U.S. at 373 ("Gibbs does not end the inquiry into whether a federal court has power to hear the nonfederal claims along with the federal ones. Beyond the constitutional minimum, there must be examination of the posture in which the nonfederal claim is asserted and of the specific statute that confers jurisdiction over the federal claim.")

1. *Article III Considerations*

Under either the doctrine of pendent-claim jurisdiction or the more limited doctrine of pendent-party jurisdiction, plaintiff first must satisfy two requirements to establish that the Court has Article III jurisdiction to hear the state claim: (l) the federal claim to which plaintiff seeks to pend the state claim must be substantial, and (2) the state claim must arise from "a common nucleus of operative fact" such that plaintiff "would ordinarily be expected to try them [both] in one judicial proceeding." *Gibbs* 383 U.S. at 725.

At the outset, the Court finds that plaintiff has set forth substantial federal claims. While New York state courts have considered and rejected some constitutional challenges to the Loft Law, *see Spring Realty Co. v. New York City Loft Board,* 127 Misc.2d 1090 (Sup. Ct., N.Y.Co. 1985), *aff'd,* 117 A.D. 2d 1029 (1st Dept.) *modf'd on other grounds,* 69 N.Y. 658 (1986); *app. dism'd,* __ U.S. __, 107 S.Ct. 3179 (1987), it appears that state courts have not considered all of plaintiff's constitutional arguments and, in any event, no federal court has ruled on the constitutionality of the Loft Law.

However, plaintiff has failed to satisfy the second requirement. The fraud and breach of contract claims against the tenant-defendants do not derive from a "common nucleus of operative fact" with plaintiff's federal claims against the governmental defendants. The federal claims concern the alleged unconstitutionality of the enactment of the Loft Law by the State in 1982, and its subsequent enforcement by the City. The state law claims concern a wide range of tenant actions at various times both before and after the enactment of the Loft Law. The Complaint is not clear as to the nexus between the state claims and the federal claims. Plaintiff suggests that the "obvious connection" is that "acting pursuant to an

unconstitutional state law, the tenants have illegally wrestled control of the building away from plaintiff."[9] Since this Court has rejected the notion that the tenant-defendants are state actors, plaintiff's argument can be reduced to the following: the nexus between the claims is that the tenant-defendants could rely upon the Loft Law in defending themselves against the state law claims. However, this is not a "common nucleus of operative facts" within the meaning of *Gibbs* and its progeny. And use of federal claims as a potential *defense* does not confer federal question jurisdiction under 28 U.S.C. § 1331.

That both sets of claims somehow involve the Loft Law is not dispositive. There is only a minimal overlap of the factual circumstances behind the constitutional and state claims, and the claims are based upon entirely different legal theories. Under such circumstances, this Court should not exercise pendent-party jurisdiction. As Judge Sweet of this Court noted:

> Although it is not necessary for the exercise of pendent jurisdiction that there be complete identity of facts and issues with respect to the federal and state claims, courts have frequently declined to assume jurisdiction where the claims are based upon different factual and legal elements.
>
> ... Even where the claims are clearly related and derive from the same event courts have held that the claims are not sufficiently one constitutional case if they are related sequentially or if the claims are based on different legal theories.

Angel Music. Inc. v. ABC Sports. Inc., 609 F. Supp. 764, 768 (S.D.N.Y. 1985) (citations omitted).

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[9] Plaintiffs' Letter Memorandum dated May 22, 1989, p. 4.

Based upon their pleadings and submissions to this Court, plaintiff has failed to establish that the claims against the governmental defendants and tenant-defendants are so closely related as to constitute one case that would ordinarily be expected to proceed in one forum. Because the claims do not arise from a common nucleus of operative facts, this Court lacks the constitutional power to exercise jurisdiction over the tenant-defendants.[10]

2. *Discretionary Considerations*

"Pendent jurisdiction is a doctrine of judicial discretion, not of plaintiff's right..." *Mahoney v. National Organization for Women*, 681 F.Supp. 129 (D. Conn. 1987). Even if the Court did have the power to hear the pendent-party claims, it would exercise its discretion not to do so. In exercising its discretion, this Court should consider judicial economy, convenience and fairness to the parties and comity. *Sparks v. Hershey*, 661 F.2d 30, 33 (3rd Cir. 1981), *citing Gibbs*, 383 U.S. at 726. These considerations mitigate against the exercise of pendent jurisdiction.

If all the claims are tried together, the City defendants would be enmeshed in a suit involving numerous issues with which they have no connection.[11] The actions against the tenant defendants are basically detailed landlord-tenant matters

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[10] In light of this ruling, the Court need not consider the second stage of analysis — whether Congress in the statutes conferring jurisdiction has not expressly or by implication negated the existence of jurisdiction. *Aldinger v. Howard*, 427 U.S. 1 (1976). The Court notes, however, that the Second Circuit has found that pendant party jurisdiction may be exercised pursuant to a main claim under § 1983 and § 1343(a)(3). *See Almenares v. Wyman*, 453 F.2d 1075 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972).

[11] The Court rejects plaintiffs' argument that the tenant defendants are "necessary parties" subject to joinder under F. R. Civ. P. 19.

which would be best brought in the appropriate state landlord-tenant court. Such a court has particular expertise and is likely to provide relief, if warranted, more quickly than this Court. Indeed, landlord-tenant issues are issues peculiar to local concern. Notions of comity suggest that they be addressed in local courts.

Although it may be convenient for plaintiff to try its entire case in the federal forum, plaintiff has not persuaded the Court that the state court forum is inefficient. Plaintiff has candidly admitted that it fears an adverse ruling in the state forum. This is equally unpersuasive. Forum shopping is condemned by the courts. Plaintiff's mere supposition that it will fare better in federal court does not warrant trying the state claims here. Based upon these considerations, even if the Court were empowered to hear the state fraud and contract claims, it would decline to do so.

B. *Rule 11 Sanctions*

Rule 11 of the Federal Rules of Civil Procedure, as amended, requires that if a party is represented by an attorney, the attorney must sign all papers submitted to the court. It further states:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existent law or a good faith argument for extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause any unnecessary delay or needless increase in the cost of litigation.

Rule 11 is posited as a directive. If the rule is violated, the court "*shall* impose upon the person who signed [the violative paper] . . . an appropriate sanction . . . ." Fed. R. Civ. P. 11. "Accordingly, where the scriptures of the rule have been transgressed, it is incumbent upon the district court to fashion proper sanctions." *Eastway Construction Corp. v. City of New York,* 762 F.2d 243, 254, (2d Cir. 1985). The rule is violated "where it is patently clear that a claim has absolutely no chance of success...," *Id.*, but courts should avoid hindsight and resolve all doubts in favor of the signor. *Oliveri v. Thompson,* 803 F.2d 1265, 1275 (2d Cir. 1986).

Applying *Eastway* and its progeny, the Court finds that sanctions are unwarranted in the present case. The Court does not find that plaintiff knew or should have known that this Court lacked subject matter jurisdiction over plaintiff's fraud and contract claims. Moreover, the Court is unconvinced that plaintiff brought its claims against the tenant-defendants for an improper purpose. Under these circumstances, the Court declines to impose sanctions against plaintiff.[12]

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[12] *Gutterman v. Eimicke*, slip op., Civ. 86-3077 (April 6, 1989) is inapposite. In that case Judge Dearie of the Eastern District assessed sanctions against plaintiff-landlords and their counsel for joining various tenants as defendants in a suit against state officials challenging the constitutionality of a state housing regulation. Unlike the present case, in *Gutterman* the court expressly found that plaintiffs had absolutely no chance of success on their constitutional claims and that plaintiffs had asserted claims against the tenant-defendants for an improper purpose.

III. Conclusion

For the reasons stated above, the Court dismisses plaintiff's counts ten through thirty-six of the Complaint for lack of subject matter jurisdiction.

SO ORDERED.

Dated: New York, New York
June 12, 1989

/s/
UNITED STATES DISTRICT COURT

Appearances:

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D-1

DEPARTMENT OF BUILDINGS

BOROUGH OF MANHATTAN, THE CITY OF NEW YORK

Date May 17, 1966 No. 63115

CERTIFICATE OF OCCUPANCY

NO CHANGES OF USE OR OCCUPANCY NOT CONSISTENT WITH THIS CERTIFICATE SHALL BE MADE UNLESS FIRST APPROVED BY THE BOROUGH SUPERINTENDENT

This certificate supersedes C. O. No. 30409

THIS CERTIFIES that the altered building premises located at 640 Broadway; 64-66 Bleecker St.; 174 Crosby St. Block 522 Lot 14

That the zoning lot and premises above referred to are situated, bounded and described as follows:

BEGINNING at a point on the east side of Broadway distant 0'-0" feet south from the corner formed by the intersection of Broadway and Bleecker Street running thence east 196'-4" feet; thence south 27'-3" feet; thence west 196'-4"; thence north 25'-3" feet; to the point or place of beginning, conforms substantially to the approved plans and specifications, and to the requirements of the Building Code, the Zoning Resolution and all other laws and ordinances, and of the rules of the Board of Standards and Appeals, applicable to a building of its class and kind at the time the permit was issued; and

CERTIFIES FURTHER that, any provisions of Section 646F of the New York Charter have been complied

with as certified by a report of the Fire Commissioner to the Borough Superintendent. Class 1. Alt. No. 2134-1965. Construction classification - Fireproof. Occupancy classification - Commercial Building. Height 9 stories, 122 feet. Date of completion - April 29, 1966. Located in M 1-5 Zoning District at time of issuance of permit.

This certificate is issued subject to the limitations hereinafter specified and to the following resolutions of the Board of Standards and Appeals: and The City Planning Commission.

PERMISSIBLE USE AND OCCUPANCY

Off-Street Parking Spaces _____

Off-Street Loading Berths _____

STORY	LIVE LOADS Lbs. per Sq. Ft.	PERSONS ACCOM-MODATED	USE
Sub-cellar			Boiler and vacant.
Cellar	150	2	Electric shop and storage.
1st Story	150	25	Stores and barber.
2nd Story	150	10	Manufacturing and cutting.
3rd Story	150	20	Offices.
4th Story	150	8	Manufacturing and cutting.
5th Story	150	15	Offices.
6th Story	150	25	Manufacturing.
7th Story	150	40	Manufacturing and cutting.

8th Story	150	8	Manufacturing and cutting.
9th Story	150	5	Manufacturing and cutting.
		NOTE:	All manufacturing is in use group 17.
			FIRE DEPARTMENT APPROVALS: Standpipe System-April 25, 1944. Interior Fire Alarm System - April 25, 1944. Thermostatic Fire Heat System - March 11, 1966.

OFFICE COPY - DEPARTMENT OF BUILDINGS

/s/_____
Borough Superintendent

NEW YORK CITY
LOFT BOARD

----------x Loft Board Order

In the Matter of the	:	# 759
Applications of Joel D.	:	MC # 0429
Hinman and Marilyn Manos	:	Re: 640 Broadway New York, New York
----------x		Docket #'s TR-0092, TR-0365

The case concerns two applications filed by the tenants of 640 Broadway, New York, New York. In application No. TR-0092, filed on August 6, 1983, Mr. Joel D. Hinman and some 23 other tenants signed a coverage application form. In application No. TR-0365, Marilyn Manos, a subtenant of the western half of unit 8E, filed an application alleging that she was the residential occupant entitled to protection. These applications were later supplemented by a letter dated February 26, 1985, contending that the following units and residential occupants were covered by Article 7-C:

2E	-	John Eisner
2W	-	Robert Rossiter
2WB	-	Loren Calaway
3E	-	Richard Yoder
3W	-	Charles Searles
4E	-	Rafael Barrios, Carlos Sosa, and Judy Levy
4WF	-	Guillermo Gleizer
4WR	-	Juliet Holland
5E	-	Joel Hinman
5W	-	Andrea Vignoli
6E	-	Hannah Eshel
6W	-	Kenneth De Lap
6WR	-	Lisa Krall

7E	-	Nancy Hoffman Giesman
7W	-	Ruth Holloman
7C	-	Kim Steele
8E	-	Rina Peleg and Marilyn Manos
8W	-	Donna Goodman
8C	-	Peter Neptune
9E	-	Temple Smith and Phoebe Rentschler
9W	-	Marie-Paule Fauque

The premises are in a section of the city known as NoHo, in an area zoned as Ml-SB. This nine-story building itself was erected around 1965 and occupies approximately 5000 square feet. The Certificate of Occupancy ("C of O"), issued on May 17, 1966, permits commercial use of the cellar and first floors, office use of the third and fifth floors, and manufacturing use of the second, fourth, sixth, seventh, eighth, and ninth floors. Under the Zoning Resolution, residential use in a building of this size located on Broadway is permitted only for joint living-work quarters for artists by a way of a special permit. Zoning Resolution Section 42-14B(l)(b). The special permit requirements are significantly simplified where the city Planning Commission determines that floor area in the building was occupied as dwelling units or joint living-work quarters for artists on September 1, 1980. Zoning Resolution Section 74-782. As of January 8, 1987, the definition of "joint living-work quarters for artists" was expanded to include units occupied by nonartists who file with the Department of Cultural Affairs by October 8, 1987. Zoning Resolution Section 12-10 (amended effective January 8, 1987).*

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* According to the City Planning Commission, residency applications and/or nonartist filings are presently pending for all the units in the coverage application.

PROCEEDINGS BEFORE THE BOARD

This case was initially conferenced on December 12, 1983, with some 16 tenants, their attorney Deirdre Carson, Esq., and the owner's attorney, Margaret Baisley, Esq., present. Soon afterwards, Gulliermo Gleizer, one of the tenants not present at the conference, filed a separate application with the Board and an Article 78 petition in the New York Supreme Court seeking to nullify the entire proceedings due to the failure to name him as an affected party in the application. His application before the Board was denied, Loft Board Order No. 0102, and the Article 78 proceeding dismissed. *Gleizer v. New York City Loft Board*, Order at 3 (New York Co. Supreme Court, June 16, 1984). On reconsideration, the Board further held that any potential prejudice to Mr. Gleizer was remedied by allowing him to file an answer to the original application. Loft Board Order No. (August 1, 1984). The history of the proceeding involving Mr. Gleizer is described in greater detail in that order.

The case was conferenced a second time before a new hearing officer on January 25, 1985. This conference was attended by 20 tenants (including Mr. Gleizer), Ms. Carson, and Richard A. Givens, Esq., the owner's new attorney. After this conference, the owner filed an answer on March 2, 1985, alleging, *inter alia*, that the applicants must show primary residential use of each window period occupant, that zoning restrictions precluded coverage, that coverage would constitute an unconstitutional impairment of contracts and a taking of property without due process, that no public emergency existed to bring Article 7-C into operation, that a hardship claim be entertained without a formal application being required, and that the Loft Board is not an impartial tribunal.

THE HEARINGS

The hearings in this case were held between March 25, 1985, and September 16, 1986, for a total of 25 days. The tenants called 27 witnesses and submitted over 250 exhibits. The owner produced no witnesses, but relied instead on several post-hearing submissions to press its legal and constitutional objections to coverage. In addition to presenting evidence upon the issue of whether individual units were residentially occupied during the window period, the tenants adduced additional testimony going to the owner's attempts to seek a zoning variance from the Department of Buildings in 1978 and a special permit from the Department of City Planning to permit residential conversion of the premises in 1982. This evidence, which the tenants' attorney represented as admissions on the part of the owner that the building was residentially occupied at least since 1978, will be discussed first.

Owner's Attempts to Convert Building to Legal Residential Use

The records of the Department of Buildings indicate that in May 1977 and November 1978 violations were issued against the owners of 640 Broadway for illegal use of the building for residential purposes. The evidence relating to the owner's subsequent attempts to obtain permission for residential conversion of the premises consisted principally of the testimony of *Joseph Lombardi*, the owner's architect. Mr. Lombardi testified that he was retained by Martin Fine (an employee of the owner 640 Broadway Renaissance Co., who purchased the building in 1978) in early 1978 to file an alteration application with the Department of Buildings to permit residential conversion of floors two through nine of 640 Broadway. After the alteration application was filed in the spring of 1978, Mr. Lombardi filed an application for a zoning variance with the Board of Standards and Appeals on April 21, 1980, to permit the residential conversion. In support of this

application, Mr. Lombardi and the owner submitted a tenant history listing the tenants in occupancy since 1978* and describing their use as "artist's studio," a permissible use under the zoning law. At the same time, Lombardi submitted several letters from real estate brokers who stated that they were unable, despite extensive advertising, to find any conforming-use tenants for the premises.

After the Zoning Resolution was amended in 1981, Mr. Lombardi withdrew the variance application and, around June 1982, filed a new special permit application with City Planning pursuant to Zoning Resolution Section 74-782.** Mr. Lombardi's attached statement remarked,

> For three and one half (3 1/2) years after [the winter of 1976] an extensive and costly campaign was waged in an attempt to find conforming-use tenants. *This campaign resulted in a complete failure.* [Emphasis added.]

Soon afterwards, Mr. Lombardi solicited documentation from the tenants to establish their residential occupancy as of September 1, 1980, and supplied these documents in an application dated June 21, 1983, indicating that the first floor was a "residential lobby" and that the second through ninth

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* The tenants listed were Rossiter (2W), Goda and Moriya (2E), Eisner (2E), Searles (3W), Yoder (3E), Barr & Winfield (4W), Gleizer (4W), Carlos Sosa (4E), Hinman & Murphy (5W), Vignoli & Gragnani (5E), Krall & Palazzollo (6W), Holloman (7W), Kida (7E), Rudman (7E), Giesmann (7E), Rexach (8W), Goodman (8W), Ohana (8E), Fauque & Bertoglio (9W), and DiGiovanni (9E).

** According to the City Planning Commission, the owner sought to withdraw this special permit application in July 1985.

floors were occupied as "dwelling units/joint living-work quarters for artists."*

Doris Diether, a member of Manhattan Community Board No. 2, testified concerning the zoning variance. She stated that, in May 1980, the owner's application for a variance came before the community board. During the hearings, some of the tenants appeared and indicated they were already living in the building. Twelve tenants** also signed a collective statement stating they were residing in the building. *See* Exhibit 23.

On June 19, 1980, the community board adopted a resolution recommending that the zoning variance application be denied. As part of the resolution, the board stated:

> This building was illegally occupied even when the owner purchased it, and the owner was aware of this fact yet did nothing about it, thus encouraging other tenants to move in, and discouraging conforming uses.

See Exhibit 20.

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* The special permit application indicated occupancy by Tanabe (2E), Rossiter (2W), Calaway (2WB), Yoder (3E), Searles (3W), Sosa (4E), Gleizer (4W), Vignoli (5E), Hinman & Murphy (5W), Palazzolo (6W), Krall (6W), Eshel (6E), Hoffman (7E), Holloman & Steele (7W), Peleg (8E), Goodman (8W), and Fauque (9W).

** The twelve tenants signing the statement were Beth Zaboth (2E), Charles Searles (3W), Charles Gifford (4W), Joel Hinman (5W), Philip Murphy (5W), Hannah Eshel (6E), Rachel Rudman (7E), Kim Steele (7W), Ruth Holloman (7W), Debra Winters (9E), Marie-Paule Fauque (9W), and Edo Bertoglio (9W).

Following this, several hearings were held before the Board of Standards and Appeals. During these hearings, Mr. Lombardi submitted new floor plans to BSA, which allegedly more accurately reflected the existing unit layouts. After this submission and prior to a February 19, 1981, BSA hearing, Ms. Diether, along with Mr. Lombardi, conducted an inspection of all the units in the building to which she was able to gain access, making notations as she went. Notations on a copy of the Lombardi floor plans are made for units 2W, 2WB, 3E, 4R, 4WB, 4E, 5W, 5E, 6W, 6WB, 6E, 7W, 7WB, 8W, and 8E. Commenting generally upon her findings in a zoning committee report, dated February 19, 1981, Ms. Diether stated:

> The conditions I encountered on the inspection were very upsetting. The tenants or at least many of them have spent considerable sums to renovate spaces in the building. Loft beds have been installed, complete kitchens and baths, fancy floors, partitions, a lot of built-in cabinets, etc. However, a good portion of the work would never pass an inspection by the Department of Buildings ... It appears to me that, in order to assure that all the units will be legal, the building should be done over almost completely, even though this will be a real hardship on the tenants.

Ms. Diether testified that in September 1981, BSA asked that the 640 Broadway variance application, along with similarly situated buildings, be withdrawn and referred to the City Planning Commission for a special permit pursuant to Zoning Resolution Section 74-782.

Residential Occupancy of Individual Units

2E

John Eisner, the present occupant of 2E,* testified that he and his wife first looked at the unit in late 1980, after they had moved to New York from Massachusetts. When they were shown the unit by building superintendent Luis Cavello, the Eisners were shocked at its condition, for it was filled with debris and broken furniture. Mr. Eisner did notice that the unit had electricity and a new bathtub and shower. Someone from the owner's office, who may have been Cavello, told Eisner that the prior tenants were a Japanese man and his girlfriend. Mr. and Mrs. Eisner ultimately decided to rent the unit and signed a lease in December 1980, telling Mr. Martin Fine, the owner, that they and their two children intended to live in the loft.

During the first three to four months of his tenancy, Mr. Eisner renovated the unit, putting up partitions for bedrooms and installing kitchen cabinets, counters, a stove, and a sink. According to Mr. Eisner, he and his family have lived in the loft continuously since January 1981 and his two children went to school at Public School 41, located at 116 West 11th Street.

In support of his claim of residential occupancy, Mr. Eisner submitted the following documentary proofs: (1) a February 15, 1981, invoice for installation of kitchen cabinets, sink, and stove; (2) a December 15, 1983, letter from Public

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* A separate coverage application filed on May 7, 1986, by Thais Favela-Schmitt, alleged that she sublet a portion of 2E from the Eisners commencing on February 1983. This application was later withdrawn by Ms. Favela-Schmitt on May 15, 1987, pursuant to a buy-out agreement with the Eisners.

School 41, stating that Wardell and Coleman Eisner, whose parent's address was 640 Broadway, had been students since 1980 and 1981 respectively; (3) a February 2, 1984, letter from New York Telephone, indicating residential service since January 22, 1981; (4) Mr. and Mrs. Eisner's joint 1980 federal income tax return; (5) Mr. Eisner's 1981 W-2 form; and (6) a December 24, 1982, IRS notice.

In addition to Mr. Eisner, two other tenants testified about the occupancy of the unit 2E. Robert Rossiter and Loren Calaway, tenants of units 2W and 2WB on the second floor since 1978, testified that they visited unit 2E prior to Mr. Eisner's tenancy. Mr. Rossiter went in the unit regularly, beginning in October or November 1978, to settle up the electricity bill for the floor, which had only one electrical meter. On these visits, Mr. Rossiter saw a bed on the floor with an alarm clock beside it, personal toiletry items in the bathroom, and a kitchen with pots and pans. Mr. Calaway testified that he also visited unit 2E while the Japanese man lived there and saw a bed and a television set.

2W

Robert Rossiter testified that he leased space in the building in 1978 after seeing a large sign in front advertising "Lofts for Rent." After being shown the entire building except for the fifth floor, Mr. Rossiter requested to lease the 2W unit and was referred to Mr. Fine at the owner's office. In discussions with Mr. Fine, Mr. Rossiter said that he was an artist and planned to work and live in the unit. The lease, which required the owner to install a new sanitary waste line for a bathroom and one additional sink, had attached to it a floor plan showing two "possible bath and kitchen" locations.

About the time Mr. Rossiter began to occupy the unit and to construct walls for a kitchen and bathroom, he made an agreement with Loren Calaway, a friend from California, to

sublet half of the space (hereinafter designated as unit 2WB). Mr. Rossiter built a demising wall dividing the unit in half and made a separate door for the newly created unit.

Mr. Rossiter stated that he hired a plumber to bring waste lines for the units. Mr. Rossiter then installed two sinks, a bathtub, a toilet, a stove, a water heater, a refrigerator, and cabinets. Later, in 1979, Mr. Rossiter and two other tenants, Charles Searles (3W) and Clem Palazzolo (6WF), hired an electrician to run individual lines to each of their units. The electrical service was initially classified as commercial but, around December 1984, Mr. Rossiter had it changed to residential. Mr. Rossiter also believed that his telephone service, which he had had since soon after he moved in, was residential.

Several other tenants testified as to Mr. Rossiter's occupancy of 2W. Joel Hinman (5W) visited 2W in October or November 1978 and saw a kitchen, a bathroom, and a bed. Charles Searles (3W) also recalled visiting the unit during construction and saw a bathroom, the demising wall between the subdivided units, and a partially finished kitchen. Loren Calaway (2WB) remembered a party in Mr. Rossiter's loft in early 1979 soon after the construction was completed. During the party, Mr. Fine complimented the appearance of Mr. Rossiter's unit.

Mr. Rossiter submitted the following documentary proofs suggesting he lived at 640 Broadway: (1) September 4, 1980, artist's certification; (2) October 5, 1978, invoice for running waste and water lines; (3) November 10, 1978, invoice for a stove and a refrigerator; (4) May 26, 1979, invoice for a dryer; (5) May 25, 1979, invoice for a washer; (6) March 5, 1979, invoice for electrical risers to 2W, 3W, and 6W; and (7) October 1978 invoices for tiles, cement, grout, and saddles.

2WB

Loren Calaway, a graphic artist and sculptor, testified that had and his wife moved to New York from California in September 1978. While looking for a place to live, Mr. Calaway ran into his old college friend Robert Rossiter, who suggested that Mr. Calaway occupy half of the space he had recently leased at 640 Broadway. On November 1, 1978, Mr. Calaway and Mr. Rossiter signed a five-year sublease, allowing the tenant to use the space to live in. Soon afterwards, Mr. Calaway and his wife had their belongings moved from California to unit 2WB.

During the next few months, Mr. Calaway and his wife put in a bathroom, with a toilet, a tub, and a sink; a kitchen, with cabinets, a sink, a stove, and a refrigerator.

Mr. Calaway testified that, as more and more tenants moved into the building, the owner installed a bank of mail boxes and an intercom system with buzzers.

Mr. Calaway submitted the following documentary proofs of residential occupancy: (1) an October 30, 1978, bill of lading from Bekins Moving, including checklists of various household items; (2) a November 24, 1978, carbon of a Citibank cashier's check to Bekins; (3) December 11, 1978, invoice for kitchen cabinets, (4) November 15, 1978, invoice for a stove; (5) a January 15, 1979, invoice for a sink, faucets, and other plumbing supplies; (6) 1979, 1980, and 1981 renewal certificates of homeowner's insurance; (7) 1979, 1980, and 1982 auto registration certificates; (8) 1979 and 1981 auto insurance ID cards; (9) Mr. Calaway's voter's registration card, indicating he registered on October 7, 1980; (10) 1980 and 1981 New York State tax returns; and (11) 1980 and 1983 artist certifications.

3E

Although Richard Yoder, the occupant of unit 3E, appeared at the January 1985 conference, he did not appear to testify at the subsequent hearings, even though served with a subpoena to attend. Nevertheless, the record contains both documentary and testimonial evidence of Mr. Yoder's occupancy. In a March 31, 1981, affidavit of the managing agent for the building, submitted to the BSA in conjunction with the variance application, the tenant of 3E is listed as "Yoder" with a lease commencing on November 1, 1978. This was also one of the units visited by Ms. Diether, who made certain corrections on her floor plan for unit 3E.

Several other tenants of the building testified to further details about Mr. Yoder. Mr. Rossiter stated that Mr. Yoder, his wife, and child moved into 3W six months after Rossiter himself arrived in 1978. Mr. Rossiter, who assisted Mr. Yoder with some electrical wiring soon after they arrived, saw a bathroom, bedroom, and a kitchen in the unit. Mr. Calaway recalled that the Yoders moved into the building in late 1978 or early 1979 and also visited 3E several times, observing a bathroom, a kitchen, and a table and chairs.

Charles Searles (3W), who knew Mr. Yoder as a painter from Seattle, used electricity from Mr. Yoder's unit while Mr. Searles was doing construction on 3W. Mr. Searles saw that Mr. Yoder constructed a kitchen and took out one of the bathrooms. Mr. Eisner also observed the construction in 3E and was later invited inside the unit, where he saw a kitchen, a full bath, and several bedrooms. About two years before the hearing, Mr. Eisner helped Mr. Yoder redo his bathroom and repair a leak. Mr. Yoder and his wife also baby-sat Mr. Eisner's children.

Lisa Krall (6WB) recalled baby-sitting for the Yoders in the unit in 1979 or 1980. She observed a bathroom, a couch,

and a kitchen. Kim Steele (7C), who was also from Seattle, also visited the Yoders at least once a year for the five years prior to the hearing and sat at their dining table.

3W

Charles Searles testified that he is a painter, sculptor, and teacher who leased unit 3W in October 1978. At that time, George Peters, an employee of the landlord, showed Mr. Searles a copy of floor plans for the third floor and told Mr. Searles that, while the owner would erect a dividing wall, Mr. Searles would have to install a kitchen and bathroom. Soon after October 15, 1978, the commencement date of his lease, Mr. Searles began to patch and paint the walls, partitioning off closets, two bathrooms, and a kitchen. He hired a plumber to install the toilet, shower, bathroom sink, and kitchen sink. Robert Rossiter helped him install an electrical riser from the basement.

In November 1978, Mr. Searles moved into the space and continued to live there up to the date of the hearing. Throughout this time, he was employed as a teacher at the Philadelphia College of Art in Philadelphia, Pennsylvania. In 1979, Mr. Searles stated that he slept in Philadelphia with friends or relatives for two nights per week during the school year. After 1979, Mr. Searles stayed one night per week in Philadelphia during the school term, for a total of 32 nights away from home from 1979 until the date of the hearing. On all other nights, he slept in unit 3W. On several occasions, Mr. Searles invited guests to his loft and, since 1982, has had an annual New Year's party.

Mr. Searles testified that he has eaten two to three meals per day at the unit since his stove and electricity were installed. Although his electrical service was initially classified as "EL-2" or commercial, it was reclassified as residential in 1983 and Mr. Searles was awarded rebates retroactive to the

commencement of his service. Mr. Searles also indicated that he has had residential telephone service since November 1978.

Robert Rossiter and Lisa Krall also testified concerning Mr. Searles' occupancy of 3W. Mr. Rossiter remembered visiting 3W in late 1978 and early 1979 in order to complete a joint electrical wiring undertaken by Mr. Rossiter, Mr. Searles, and Clem Palazzolo (6WF). Mr. Rossiter testified that, on his first visit, he saw a bed and, in subsequent visits, saw a bedroom, bathroom, and kitchen being constructed. Mr. Rossiter helped Mr. Searles hook up his stove. Mr. Rossiter also recalled attending Mr. Searles' New Year's parties. Lisa Krall (6WR) recalled visiting Mr. Searles' unit in approximately 1979 and saw a working bathroom.

Mr. Searles submitted the following documentary proofs of residential occupancy: (1) a 1980 W-2 form; (2) an August 1980 New York Telephone bill; (3) an August 1980 Con Edison bill; (4) an April 1984 letter from Con Edison re: rebate for residential use.

4E

Rafael Barrios testified that he is a sculptor who first saw 640 Broadway in September 1978 after answering a *Village Voice* advertisement for loft space. He and his friend Carlos Sosa decided to rent 4E together and returned to execute a lease. Because Martin Fine preferred that only one name be on the lease, the lease was executed in Mr. Sosa's name. At this time, Mr. Barrios and Mr. Sosa told Mr. Fine that they intended to renovate the unit to enable them to live and work there and Mr. Fine indicated that there would be no problems. Mr. Fine also agreed to include a fixture reimbursement clause in the lease to allay fears about not getting paid for construction work if Mr. Barrios and Mr. Sosa vacated.

Soon after signing the lease, Mr. Barrios moved a mattress and sculpting tools down from his sister's house in

Westchester County and Mr. Sosa purchased a futon to sleep on during the renovation work. The major part of the renovations took four months of continuous work. These renovations consisted of replacing 15% to 20% of the floor and sanding and painting the rest of the floor; removing plaster and exposing and cleaning the bricks; installing electrical wiring and electric meter, gas, bathroom piping, a kitchen stove, and a kitchen sink; and adding a bathtub, shower and gas water heater to the two existing bathrooms.

Five months after the gas water heater and stove were installed, Con Edison turned off the gas for the building because the gas use was illegal. Mr. Barrios then purchased a new electric hot water heater and stove.

Mr. Barrios testified that, since taking occupancy, he and Mr. Sosa have shared the rent and that the landlord has always accepted Mr. Barrios's checks.

Mr. Barrios submitted the following documents to support his claim of residential occupancy: (1) March 1980 and November 1981 rent checks; (2) a November 1979 rent receipt to Mr. Barrios; (3) a February 10, 1979, invoice for a sander, edger, and steel wool; (4) a December 17, 1981, invoice for an electric range; (5) a January 11, 1982, invoice for an electric water heater; (6) a September 28, 1979, business certificate; (7) 1978, 1979, 1980, and 1981 federal and state income tax returns; (8) a 1979 W-2 form; (9) February 19, 1981, NYU transcript request with transcripts attached; and (10) December 21, 1981, exterminator bill.

Judy Levy testified that she and her thirteen-year-old daughter have resided in 4E as roommates of Mr. Barrios since July 1981. She stated that she and her daughter occupy one area and share a kitchen (with a stove, sink, refrigerator, shelves, a table, and chairs) and a bathroom (with a toilet, sink, bathtub, and shower) with Mr. Barrios. She, her daughter,

and, for a brief period in 1983, her new husband, have cooked, slept, and eaten in the unit from 1981 through 1984. Ms. Levy stated that Mr. Sosa is in the unit infrequently because he shows his art all over the world.

Ms. Levy submitted the following documents to support her claim of residential occupancy: (1) a May 26, 1983, marriage certificate; (2) a July 1981 and 3 post-1982 rent checks; (3) 1981 and 1983 federal income taxes.

4W

Of all the units in the building, unit 4W, later to become units 4WF and 4WR, was the focus of the most widely diverging testimony. According to several tenants, the earliest known resident of unit 4W was Jerry Barr, who did not testify at the hearings. Rafael Barrios testified that Mr. Barr was occupying 4W when Mr. Barrios assumed occupancy in 1978. Mr. Barrios saw Mr. Barr come and go from the loft both day and night, observed a bed and a refrigerator inside the unit, and therefore concluded that Mr. Barr was living there. Mr. Barrios believed that Mr. Barr vacated the unit in approximately March of 1980, which was when the tenants were forced to make new arrangements for the garbage, which had previously been handled by Mr. Barr.

Robert Rossiter also recalled visiting Mr. Barr's unit to deliver money for the garbage removal service. In the unit, Mr. Rossiter saw a loft bed, a hot plate, and a full bathroom. Mr. Rossiter also recalled that, when Mr. Barr left the building, he lowered a bathtub out of his window in the middle of the night. Joel Hinman also visited Mr. Barr's unit in late 1978 or early 1979 and saw evidence Mr. Barr was living in the space.

Guillermo Gleizer testified that he leased 4W under a lease dated April 15, 1980, for a four-year lease term commencing on May 1, 1980. Under this lease, Mr. Gleizer could make alterations in the space and sublet. Over the next

few months, Mr. Gleizer subdivided 4W into two separate units, 4WF and 4WR, installing two bathtubs, two toilets, two bathroom sinks, two kitchen sinks, and two hot water heaters. He also put in a separate door for 4WR and a washer and dryer. Because each unit has a separate history from this point on, each will be dealt with separately.

4WF

Mr. Gleizer testified that, up until the plumbing work on 4W was completed, he stayed with his friends Rafael Barrios and Carlos Sosa in unit 4E. Around May 1980, Mr. Gleizer moved into 2WF, sleeping in a sleeping bag on a mattress found for him by Mr. Barrios. A telephone was installed with residential service in July 1980. Separate residential electrical service for 4WF and 4WR began in September 1980. Mr. Gleizer filed his income tax listing unit 4W as his residence and continued to live in 4WF until May 1981, when he moved in with his girlfriend on East 94th Street.

In May 1981, Mr. Gleizer ran an ad in the *Village Voice* for the 4WF space. this ad was responded to by Bruce Jope, who executed a one-year sublease for May 1981 through May 1982. The sublease was approved by Mr. Peters on behalf of the landlord.

According to Mr. Gleizer, Mr. Jope and his partner, Frances Tovey, leased 4WF to use as a distribution and publication office for their magazine. Mr. Gleizer testified that Mr. Jope and Mr. Tovey shared an apartment in Wilmington, Massachusetts, and commuted to New York City for two and three days at a time. Mr. Gleizer understood that they would sleep in 4WF only if they needed to stay in the city for more than one day. After Mr. Jope's lease ended, Mr. Gleizer again sublet 4WF first to Sebastian Cortes, from October 1982 to October 1983, for making videos, and later to Gleizer Travel, a

business run by Gleizer's cousin. This business was occupying the space at the time of the hearing.

At the time of the hearing, Mr. Gleizer was residing with his wife at 400 East 71st Street. On cross-examination, he stated that he was not seeking protection as a residential occupant of 4WF or 4WR, but indicated that he was reserving any rights which may flow through him to a subtenant.

The applicants' attorney, Ms. Carson, offered the following documents to show the residential occupancy of 4WF: (1) various April and May 1980 lumber invoices; (2) an April 26, 1980, invoice for a refrigerator; (2) a May 1980 construction contract for "2 apartments"; (4) July 1980 and January 1981 New York Telephone bills; and (5) June 1980, September 1980, October 1980, and February 1982 Con Edison bills.

4WR

As to the rear unit, *Charles Gifford*, an architect, testified that he sublet the unit under a sublease running from May 1980 until 1982. Mr. Gifford paid $4000 to Mr. Gleizer for the fixtures in the unit. These included a toilet, bathroom sink, bathtub, kitchen sink, stove, refrigerator, and hot water heater. Although the agreement provided for use of 4WR as an "artist and architect's studio/artistic gallery," Mr. Gifford testified that he leased the space to live in and told Mr. Gleizer as much. Mr. Gifford stated that he was not an artist and never had an "artistic gallery" in 4WR, but instead, was employed as an architect for an architectural firm on East 45th Street. Mr. Gifford did testify that he worked on drawings in the unit after work hours for private clients. He did not deduct the expenses from the unit on his income taxes. Mr. Gifford moved out in March 1982 without receiving his $4000 fixture fee.

Mr. Gifford testified that, during his tenancy at 4WR, he paid Mr. Gleizer for electricity because the account was in

Mr. Gleizer's name. Mr. Gifford also stated that he disposed of most of his records in 1984 when he bought a house.

Joel Hinman corroborated Mr. Gifford, stating that he visited Mr. Gifford's loft during his tenancy and saw a bed, a bathroom, some furniture and a small kitchen.

Juliet Holland, a mixed media artist of both paintings and sculpture, testified that she answered a *Village Voice* ad in 1982 for a loft and met with Mr. Gleizer. Ms. Holland was then in the process of moving from Westport, Connecticut, and finally sold her Westport house on June 1, 1980. Ms. Holland signed a one-year lease for 4WR from June 1982 until June 1983. The lease was for an "artist studio/artistic gallery."

Ms. Holland obtained residential telephone service on June 11, 1982. Ms. Holland testified at first she left the Con Edison account in Mr. Gleizer's name and paid the bills, but later changed the account to her own name.

In 1982 and 1983, Ms. Holland testified that she filed her income taxes from 54 Harbor Road, Westport, Connecticut because she received all of her income from Connecticut. The Connecticut address was a small cottage, which Ms. Holland owner and she where she kept a kiln. During the winter months of 1982, 1983, and 1984, Ms. Holland leased the Westport cottage, giving her address as landlord as unit 4WR at 640 Broadway.

Ms. Holland provided the following documentary evidence of her residential occupancy of 4WR: (1) a June 1982 Con Edison bill indicating residential service; (2) a June 16, 1982, exterminator bill; (3) a June 17, 1982, homeowner's insurance policy; (4) a February 3, 1984, letter from New York Telephone indicating residential service since June 11, 1982.

Much of the evidence offered by Mr. Gifford and Ms. Holland was denied by Mr. Gleizer, who testified categorically

that 4WR "was never residentially occupied" and that none of his subtenants ever indicated to him that they intended to reside in 4W. Mr. Gleizer stated that, after Mr. Gifford's departure, he used 4WR to store antiques for two months. Mr. Gleizer also objected to Mr. Gifford's testimony on the grounds that he had not received notice Mr. Gifford would appear and was therefore unprepared to conduct cross-examination. Although Mr. Gifford cross-examined Mr. Gifford upon the nature of Mr. Gifford's occupancy of 4WR, Mr. Gleizer made a motion to strike the testimony until he could retain counsel to conduct a new cross-examination. The motion was denied by the hearing officer.

5E

Andrea Vignoli testified that, in October 1978 inquired about a "Lofts for Rent" sign at 640 Broadway and, after speaking with Martin Fine at 644 Broadway was shown several lofts. Mr. Fine told Mr. Vignoli that there would be no problem with his living at the space and that there would be heat and elevator service during all hours. Mr. Fine also predicted that the building would become a residential co-op within two years. Mr. Vignoli and his friend, Michele Gragnani, executed a six-year lease for 5E.

Mr. Vignoli renovated the space, which he believed had been used as an office, by building two bathrooms, a kitchen, two bedrooms, one with a loft bed. He refinished the floors. He installed electrical wiring, sinks, toilets, and showers in both bathrooms, a gas and electric boiler, and a washer and dryer. Rafael Barrios built some kitchen cabinets. Mr. Vignoli purchased a refrigerator, a stove, a bed, a sofa, and some tables, but did not keep the receipts.

Mr. Vignoli stated that he or Ms. Gragnani had telephone installed in December 1978 or January 1979. From then through 1981, Mr. Vignoli slept every night in the loft

with the exception of a four-month business trip to Italy. Mr. Vignoli also worked in the loft. He has no other residence and no other property.

Several other witnesses testified about Mr. Vignoli's occupancy of 5E. Joel Hinman recalled visiting the unit several times beginning in 1979 and saw bedrooms, a refrigerator, and a very large bathtub. Rafael Barrios had dinner in the unit after he and Mr. Vignoli finished construction. Finally, Doris Diether recalled visiting 5E during her inspection and described it as "very fancy and apartment-like."

Mr. Vignoli submitted the following documents in support of his claim of residential occupancy: (1) a February 21, 1980, receipt for a cocktail table and table; (2) a January 24, 1980, and July 10, 1981, doctor's bills; (3) an August 1980, driver's training certificate; (4) a May 19, 1981, receipt for a mattress; (5) a May 7, 1981, notice of homeowner's policy binder; (6) October 4, 1980, hunting license and big game license; (7) 1981 and 1982 federal and state income tax returns.

5W

Joel Hinman, an independent filmmaker, testified that in August 1975, he and his friend James Faber executed a five-year lease for unit 5W, a space that was then divided into office cubicles. During the lease negotiations, Mr. Hinman and Mr. Faber told Ira Weissman, an employee of the managing agent, that they planned to live in the unit. Mr. Weissman said that this was all right, but that they would still be issued a commercial lease.

Soon afterwards, Mr. Hinman and Mr. Faber moved into 5W and began renovating it. They hired a plumber to install a toilet, a bathtub, a shower, a bathroom sink, and a kitchen sink. They built a security door to prevent access from the fire escape and the 5E unit, which was then vacant. Mr.

Hinman obtained electrical and telephone service, both of which were classified as residential.

In August 1978, after the building had been through a receivership and finally purchased by the present owner, 640 Broadway Renaissance Company, Mr. Hinman met with Martin Fine to negotiate a new lease. Mr. Hinman requested that the lease include a clause acknowledging that he was living in his loft, but Mr. Fine did not respond to this request. Soon afterwards, Mr. Fine and a work crew were inside 5W constructing a wall. According to what Mr. Fine told Mr. Hinman while the two were standing in Mr. Hinman's kitchen, this wall was to allow 5E access to the elevator.

A few months later, after Con Edison discontinued gas service because the building was not legally residential, Mr. Hinman replaced his gas hot water heater with an electrical one and, at the same time, had new electrical outlets installed. Mr. Hinman stated that he is an independent film maker and works at the offices of whoever his present employer happens to be. He did state, that for two weeks in December 1984, he operated his business out of his loft.

Mr. Hinman submitted the following documents in support of his claim of residential occupancy: (1) August through October 1975, accounts of construction expenses; (2) photographs taken in September 1978; (3) a December 20, 1978, invoice for a hot water heater; (4) December 1979, January, April, May, October 1980, and August 1981 Con Edison bills; (5) January and April 1980 and August 1981 New York Telephone bills; (6) an October 11, 1980, voter's registration card, indicating residence for five years; (7) a February 1979 homeowner's insurance policy; (8) NYU transcripts showing attendance from 1976 through 1983; (9) 1976 and 1977 federal income tax returns; (10) 1980 and 1983 applications for filing extensions for income tax; (11) February, March, and April 1980 bank statements; (12) a May

17, 1984, letter from City Planning granting Mr. Hinman's grandfathering application.

6E

Hannah Eshel, a sculptor, testified that she was born in Israel, where she attended art school. After studying for several years in Italy, she moved to New York in the fall of 1978. A real estate agency sent her to 640 Broadway, where she decided to lease half of the sixth floor. She next met with George Peters at 644 Broadway and filled out an "Application for Loft," giving information such as numbers of children, pets, and loft-mates. On this same application, Ms. Eshel wrote in "1/2" for "live-work" where the form asked for the reasons she was moving. Ms. Eshel told Mr. Peters that her son and niece might be living with her. She then executed a six-year lease commencing on November 1, 1978.

When she started to renovate her unit, Mr. Fine told her that he was applying for a new certificate of occupancy for the building and wanted all work done by licensed electricians and plumbers. Ms. Eshel therefore used Mr. Fine's recommended plumber to install a kitchen sink, a bathroom sink, a bathtub, and a hot water heater. Also upon Mr. Fine's insistence, Ms. Eshel obtained tenants' insurance through a company contacted by Mr. Peters.

Ms. Eshel had a commercial electrical account, which she was unable to have changed to residential because she used electricity in her sculpting. Her telephone bills were sent to Apt. 6E. She testified that she deducted a portion of her electrical and telephone costs on her tax returns.

At least two other tenants also testified as to Ms. Eshel's occupancy. Andrea Vignoli recalled visiting Ms. Eshel's unit during 1979 and seeing her bedroom, which was unenclosed. Kim Steele (7C) also visited Ms. Eshel's unit for a party and saw her bedroom and her kitchen.

Ms. Eshel submitted the following documents as proof of her residential occupancy: (1) "Application for Loft"; (2) October 24, 1978, homeowner's insurance application and September 24, 1980, insurance bill; (3) November 1978, April 1980, and December 1981 New York Telephone bills; (4) July 17, 1979, marriage certificate; (5) March and April 1980 and December 1981 bank statements.

6W

Lisa Krall testified that, in October 1978, she saw a sign at 640 Broadway advertising "Lofts for Rent" and, after calling the number given, met with George Peters. She told Mr. Peters that she intended to live and work in the loft. When she expressed some misgivings about taking a commercial lease, she was assured it was all right to live there. Several days later, on November 28, 1978, Ms. Krall and a friend, Jack Walters, signed a four-year lease commencing January 1, 1979. Although Mr. Walters decided not to occupy the space and assigned all of his rights to Ms. Krall, Ms. Krall moved into the unit right away. She advertised for someone to help renovate the space in exchange for a leasehold on half of the unit and Clem Palazzolo responded. On January 23, 1979, Ms. Krall and Mr. Palazzolo then entered into a written agreement, notarized by George Peters, and signed in the owner's offices, whereby Mr. Palazzolo would build a kitchen and bathroom in Ms. Krall's space. Almost immediately, 6W was subdivided into 6WF, to be occupied by Mr. Palazzolo and 6WR, to be occupied by Ms. Krall.

6WR

In her space, Ms. Krall installed new walls; a kitchen with a sink, oven, hot plate, water heater, and refrigerator; and a bathroom with a sink and a tub. She obtained tables, chairs, a bed, trunks, bookcases, and a modular sofa unit. She initially had a commercial Con Edison account, which was changed

retroactively to residential service in 1981. Ms. Krall also had residential telephone service installed in January 1979.

Ms. Krall testified that she began to sleep in 6W as soon as the lease was signed, showering elsewhere until the plumbing was completed. In 1979 and in the succeeding years, she estimated that she spent at least 300 nights in the loft. She also stated that, beginning in 1979, she cooked in the loft at least four out of seven days per week. Since 1979, she has had no other residence.

Ms. Krall submitted the following documentation as proof of her residential occupancy: (1) the January 23, 1979, agreement between Ms. Krall and Mr. Palazzolo; (2) a July 1979 voter's registration, indicating residence for seven months; (3) an October 29, 1982, letter from New York Telephone, indicating residential service since January 1979; (4) an April 6, 1983, letter from Con Edison, indicating retroactive rebilling as a residential account; (5) May and July 1981 bank records; (6) October 15, 1980 and September 16, 1981, promissory notes for a student loan; (7) 1980 and 1981 federal and city income tax returns.

6WF

Clem Palazzolo did not testify at the hearings. However, several other tenants testified concerning his occupancy of 4WF. *Ms. Krall,* as already mentioned, testified that Mr. Palazzolo moved into 6WF around December 1978 and lived there until September 1981, when he assigned the space to Kenneth De Lap for a $7500 fixture fee. This assignment was consented to bye Martin Fine.

Robert Rossiter recalled visiting both 6WR and 6WF in early 1979. Loren Calaway stated that, in 1979, he visited Palazzolo's unit and observed a loft bed and a kitchen. Charles Searles, too, visited 6WF during the renovation work, sometimes working with Palazzolo. He recalled that Palazzolo

built a bathroom, a kitchen counter, and a loft bed. In 1979, Joel Hinman also observed a living area with couches, a stereo, and photographic equipment.

Kenneth De Lap, a dancer and choreographer, testified that he saw a *Village Voice* ad in July 1981 for a loft and made an appointment with Clem Palazzolo to see it. Mr. De Lap gave Mr. Palazzolo a $200 deposit and, after speaking with Joel Hinman about the tenants' relationship with the building's owner, decided to lease the space. Mr. De Lap and Mr. Palazzolo executed an assignment whereby Mr. De Lap paid Mr. Palozzolo a fixture fee of $7500. Mr. Palazzolo obtained the written approval of Martin Fine to this assignment. In addition, Mr. De Lap was assured by George Peters that his use of the loft to live and to work was acceptable to the owner.

When Mr. De Lap moved into 6WF around September 1981, the unit had a kitchen with a stove and refrigerator, a bathroom with a sink, toilet, and shower, and a loft bed. The unit also had a large open space, which Mr. De Lap planned to use for dancing. Mr. De Lap testified that, since moving into the unit, he has slept and eaten there every day when he was not on the road with his work.

Mr. De Lap kept Mr. Palazzolo's telephone account, which was residential, and had the name changed to his own name. Although Mr. De Lap's Con Edison service (which he shares with Ms. Krall), was initially commercial, he had it changed in 1983 to residential after a service representative inspected 6WF and 6WR. At the same time, Mr. De Lap received a refund retroactive to the beginning of his account.

Mr. De Lap produced the following documents in support of his and Mr. Palazzolo's residential occupancy of 6WF: (1) Mr. Palazzolo's 1979 construction receipts and invoices, for a water heater, bathroom sink, kitchen sink, toilet, refrigerator, loft bed, shower head, counter tops, and a

stove; (2) certified copies of 1979 and 1980 Manhattan Telephone Directory, listing "Clement A. Palazzolo"; (3) the September 3, 1981, assignment from Mr. Palazzolo to Mr. De Lap; (4) the August 7, 1981, consent of Martin Fine to the assignment; (5) a September 19, 1981, New York Telephone bill; (6) a February 19, 1985, letter from New York Telephone, indicating residential service since September 17, 1981; (7) an April 6, 1983, letter from Con Edison, indicating retroactive rebilling as a residential account; (8) Mr. De Lap's 1981 federal and state income tax returns.

7E

The occupants of unit 7E prior to December 1980 did not testify at the hearings. However, several other tenants testified as to their occupancy. Lisa Krall testified that the tenant as of late 1978 was Mira Kida, a Japanese toy salesman. Ms. Krall visited Mr. Kida's unit and saw a working bathroom and an unfinished kitchen. Soon after Ms. Krall moved in January 1979, two sisters moved into 7E. Ms. Krall also visited these sisters and observed a couch and some beds.

Robert Rossiter stated that his girlfriend was friends with the sisters, Rachel and Deborah Rudman, and he and his girlfriend visited the Rudmans in 7E. Joel Hinman also visited the Rudmans in late 1979, complaining about loud music in the middle of the night. In addition, Rachel Rudman was a signatory to a collective statement from the 640 Broadway tenants, submitted to the community board in June 1980.

Nancy Hoffman Giesmann, a painter, testified that she subleased a portion of 7E from the Rudmans beginning in July 1980 and moved in in August. At that time, Ms. Giesmann's space was separated from the Rudmans' space by a partial dividing wall and Ms. Giesmann and the Rudmans shared a bathroom, with a bathtub, a shower, a toilet, and a sink, and a

kitchen, with cabinets, a sink, a hot plate, a refrigerator, and a hot water heater.

Approximately October 1980, the Rudmans decided to vacate. Ms. Giesmann and two new roommates, Marsha Dalby and Linda Henneman, leased the entire 7E unit jointly, paying the Rudmans a $3000 fixture fee. The lease documents were executed at the owner's offices in the presence of George Peters. In 1982, Ms. Henneman and Ms. Dalby also vacated, assigning their interest to John Kelsch. In 1983, Mr. Kelsch, too, left, relinquishing any claim to the unit.

Ms. Giesmann submitted the following documents in support of her and the Rudman's residential occupancy of 7E: (1) the October 15, 1980, fixture receipt from Rachel Rudman for a bathroom tub, sink, and toilet and a kitchen sink and hot water heater; (2) September, October, November, and December 1980 and February 1981 New York Telephone bills; (3) an August 1980 through August 1981 and an August 1983 through August 1984 homeowner's insurance policy and renewal; (4) December 1980, April 1981, September 1981, and October 1981 Con Edison bills, indicating residential service; (5) a July 30, 1982, lease assignment from Henneman and Dalby to Giesmann and Kelsch, notarized by George Peters; (6) a June 21, 1983, letter from Mr. Kelsch relinquishing his rights to Ms. Geismann; (7) November 1983 veterinarian bills.

7W and 7C

Ruth Holloman, a painter, testified that she leased the entire 7W space under a five-year lease commencing August 1979. At that time, she told George Peters that she intended use the unit as living and working space. Soon after the lease was executed, Ms. Holloman sold her house in Hartford, Connecticut, and began renovations, installing a shower, a bathroom sink, a toilet and a kitchen sink, a stove, a refrigerator, cabinets, and hookups for a washer and dryer.

And, since she planned to sublet part of the space, she also had one of the owner's employees build a second entrance door to the hallway. In October or November 1979, Ms. Holloman sublet part of her space (designated as 7C) to Kim Steele.

Ms. Holloman, who appeared subject to a subpoena, testified that she broke away from the tenants' association when they began a rent strike that she did not agree with. She stated that she could not find most of the records subpoenaed by Ms. Carson, the attorney for the other tenants. In support of her residential occupancy, Ms. Holloman submitted only the following documentation: (1) a September 29, 1979, receipt for a door and (2) April through November 1979 invoices for plumbing and electrical work.

Kim Steele, a photographer, testified that he answered Ms. Holloman's *Village Voice* ad for loft space to rent in September or October 1979. When Mr. Steele saw unit 7C, the dividing wall between 7W and 7C was under construction and electricity and plumbing risers had been installed. No other work had been done on the 7C space. Mr. Steele and Ms. Holloman executed a five-year sublease, commencing in October 1979, whereby Mr. Steele gave Ms. Holloman a $2500 fixture fee for work already done to the space. Mr. Steele testified that, at the time the sublease was executed, George Peters reviewed and initialed a floor plan of units 7W and 7C, showing the location of two bathrooms and two kitchens.

Mr. Steele moved into 7C soon after the sublease was signed. He constructed a kitchen, with a stove, a refrigerator, a sink, and a washer/dryer; a bathroom, with a sink, a toilet, and a shower; and a darkroom for his photography work. He installed track lighting. Together with Ms. Holloman, he also installed a hot water heater.

For two years, Mr. Steele paid his rent to Ms. Holloman. In approximately October 1981, Mr. Steele requested that the owner add his name to the lease. Martin Fine refused this request, but did permit Mr. Steele to make rent checks payable to "640 Broadway Renaissance Corp."

Mr. Steele submitted the following documents in support of his claim of residential occupancy of 7C: (1) October 10, 1979, sublease agreement, indicating $2500 fixture fee; (2) November 1979 bank statements; (3) April 1980 New York Telephone bill; (4) August 28, 1980, voter's registration, indicating residence for one year; (5) 1979 and 1980 federal and state income tax returns; (6) March 5, 1984, letter from New York Telephone, indicating residential service since September 1980; and (7) July 26, 1982, and January 7, 1983, homeowner's insurance renewal notice and correspondence.

8E

Avri Ohana, a painter, testified that he answered a *Village Voice* ad in June 1980 for a loft and was shown the 8E space by Luis Cavello. Mr. Ohana recalled that the space had once been a nightclub and was badly damaged by fire. Although Mr. Ohana was aware other prospective tenants looking at the space were dubious about renting it, Mr. Ohana decided to lease the space, executing a four-year lease commencing on August 1980. At the time he signed the lease, he asked about the term "commercial lease" but was told by someone from the owner's office that everyone has been living in the building and that he should not worry about it.

For the first four months of renovations of the 8E space, Mr. Ohana slept on a mattress on the floor, used the bathroom facilities of friends, and cooked on a hot plate. He filled up the holes in the floor, scraped and painted the walls, and installed a kitchen, with a sink, gas stove, and cabinets,

and a bathroom, with a shower. On August 31, 1980, Rina Peleg, a friend from Israel, moved into 8E. After Ms. Peleg arrived, Mr. Ohana constructed a dividing wall, another kitchen, and another bathroom with a bathtub. From August 1, 1980, until the end of 1980, Mr. Ohana stated that he slept at the loft every night, and that Ms. Peleg slept there from August 31, 1980, until the end of 1980. Mr. Ohana also testified that Martin Fine visited him in his loft many times in 1980.

In 1981, Mr. Ohana traveled a great deal, but continued to live at the loft and stay there when he was in New York. In November 1981, Mr. Ohana assigned his lease to Ms. Peleg. In January 1982, Mr. Ohana vacated the loft entirely, receiving a $10,000 fixture fee from Ms. Peleg and two other roommates, Marilyn Manos and Carolyn Abedor. At the same time, Mr. Ohana executed another assignment and power of attorney to Ms. Peleg.

Rina Peleg, a sculptor, testified that she rented the back portion of 8E from Mr. Ohana in August 1980 pursuant to an oral agreement. On August 30, 1980, she moved her sculpture and personal belongings into the space, spending the night there. She testified that she has continued to live in the unit ever since.

At the time Ms. Peleg moved in, Mr. Ohana had a bed and refrigerator in the front space and was living there. He continued to live in the space until January 1982. Ms. Peleg testified that, soon after she moved in, Mr. Fine sent an electrician to bring electricity to the eighth floor and the owner's office later sent them a bill. In her space, Ms. Peleg refinished the floor, built a loft bed with a closet underneath, and installed a kitchen counter, a gas stove, a refrigerator, and a telephone. In 1982, when the gas service to the building was discontinued, she bought an electric stove and an electric hot water heater.

In late 1981, Mr. Ohana announced that he was leaving the building. At that time, Mr. Ohana and Ms. Peleg executed an assignment at the owner's offices, agreed to with an initialed "OK" by George Peters. Beginning in February 1982, Marilyn Manos and Carolyn Abedor sublet the front part of the 8E space from Ms. Peleg, paying a fixture fee of $9000.

Marilyn Manos testified that she answered a *Village Voice* ad in December 1981, met with Ms. Peleg, and visited the 8E West unit. At that time, the space contained a large open area, which was then in use as a painting studio; a kitchen with a refrigerator, a hot plate, and sink; a bathroom with a toilet, sink, and shower; and a loft area with a chest of drawers, a couch, a table, a desk, a cabinet, and a bed. Ms. Manos and her roommate, Carolyn Abedor, ultimately agreed to a two-year sublease commencing in February 1982.

Over the next few years, Ms. Manos lived in 8E. She also spent $20,000 in renovating her loft, she testified. As already mentioned, Ms. Manos filed a separate coverage application (Docket No. TR-0365) alleging that she is the protected occupant of 8E. By a letter of February 24, 1986, from Ms. Manos' attorney David H. Pritchard, this application was withdrawn pursuant to an agreement with Ms. Peleg. Ms. Peleg is thus the sole occupant asserting rights to the 8E unit.

Ms. Peleg submitted the following documents in support of her claim of residential occupancy: (1) October 6, 1980, electrician's bills to Mr. Ohana, with checks indicating payment; (2) August 30, 1980, moving expenses invoice to Ms. Peleg; (3) November 17, 1980, receipts to Ms. Peleg for lumber; (4) March 2, 1981, letter from Martin Fine, indicating bill for electrician's work; (5) November and December 1980, and January through December 1981 Con Edison bills, indicating residential service; (6) May 15, 1981, naturalization application, indicating residence since September 1980; (7) November 4, 1981, invoice for a hot water heater; (8)

November 3, 1981, assignment from Ohana to Peleg, initialed "OK" by George Peters; (9) October and November 1980 and January and February 1981 New York Telephone bills; (10) December 20, 1981, *Village Voice* ad; (11) July 1, 1985, letter from New York Telephone indicating residential service since September 17, 1980.

8W

According to several tenants, unit 8W was residentially occupied in 1979 and early 1980 by a Spanish family named Rexrach. Kim Steele testified that, on several occasions in 1979 or 1980, he knocked on the door of 8W to complain about loud rock music being played late at night. He observed a Spanish woman living in the unit with her daughter and granddaughter. He recalled seeing a kitchen and a bed. On one occasion, he saw the daughter breast-feeding her baby. Avri Ohana also recalled seeing the Spanish family in 8W when he answered the loft ad in June 1980. At that time, he saw a bathroom with a leaky bathtub. However, when Mr. Ohana moved into 8E one month later, the Spanish family was gone.

Donna Goodman, a licensed architect, testified that she contacted Martin Fine in the summer of 1980 about renting a loft. In early July 1980, Mr. Fine showed her the eighth floor of the building and she decided to rent the west portion. However, she secured Mr. Fine's consent to split the west portion in half once more, creating a unit 8W and a unit 8C, and to then lease only the 8W for herself. Ms. Goodman executed a four-year lease for 8W, commencing September 1, 1980. During discussions, Mr. Fine assured Ms. Goodman that it was acceptable for her to live in the loft. A letter attached to the lease obligated the owner to install an intercom and mailboxes. It was also agreed that Luis Cavello, the building superintendent employed by the owner, would occupy 8C and that Mr. Cavello would help Ms. Goodman construct a dividing wall, bathrooms, and kitchens. Finally, it was agreed

that Ms. Goodman could occupy the loft and begin renovations prior to the commencement of the lease on September 1, 1980.

Ms. Goodman moved into 8W in mid-August 1980. She prepared plans for her renovation and sent them to Mr. Fine for his approval, as had been agreed. She also used the plans to define the work to be done by her contractor, Moshe Frankel. According to her agreement with Mr. Fine, Ms. Goodman and Mr. Ohana each paid the owner $1200 for bringing the electrical risers to the eighth floor and installing two meters. In the fall of 1980, Ms. Goodman hired a new electrician to remove Department of Buildings violations issued against other electrical work done by the owner's electrician in her unit.

Mr. Frankel, Ms. Goodman's contractor, began renovating the loft in August 1980. He refinished the floors, removed and replaced several walls, and built a closet and a storage area above the kitchen. He also installed a bathroom, with a bathtub, shower, sink, toilet, hot water heater, and a washing machine, and a kitchen, with a sink, a refrigerator, a dishwasher, and a stove. She later replaced the gas hot water heater with an electric one and added a microwave oven.

Ms. Goodman testified that she slept in the loft beginning in mid-August 1980, showering at her gym until the bathroom was completed and cooking on a hot plate until the kitchen was installed. In October and November 1980, due to a death in her family, she was away from the city a great deal. In addition, for the first two weeks of December 1980, she studied for her architectural exams at her parents house, returning to the loft for the last two weeks in December. Since the beginning of 1981, Ms. Goodman stated that she has not been away from the loft for more than three nights per year.

Ms. Goodman testified that from 1980 to 1983 she filed her taxes using her parent's Pennsylvania address because part

of her income comes from Pennsylvania. She deducted a percentage of her rent, telephone, and electricity on her taxes. Her tax return is the only place where she listed a Pennsylvania address.

Ms. Goodman offered the following documentation to support her claim of residential occupancy: (1) August 24, 1980, floor plans; (2) August 27, 1980, letter from Ms. Goodman to Martin Fine enclosing floor plans; (3) July 19, 1982, letter from George Peters to Ms. Goodman, recognizing her access to loft from August 13, 1980 (submitted as part of owner's special permit application to City Planning); (4) December 1980 electrician bill; (5) March 1981 Department of Buildings inspection certificate indicating use as "office and living"; (6) August and September 1980 receipts for a refrigerator, a hot water heater, a shower, and a toilet; (7) September and October 1980 checks for construction work; (8) architectural license, expiring in August 1983; (9) September 1980, May 1981, December 1981, and January 1982 bank statements.

8C

The window period occupant of the 8C unit did not testify at the hearing. According to the testimony of Donna Goodman and nine other tenants, 8C was residentially occupied by the building superintendent, Luis Cavello, from approximately August 1980 until July 1982. Donna Goodman testified that Mr. Cavello moved into 8C at approximately the same time she did in August 1980, since she observed a kitchen, sofas, clothing, and a sleeping area. In the kitchen she saw a sink, dishes, utensils, a stove, and a refrigerator. She also recalled seeing Mr. Cavello and his girlfriend, whom he later married, in the building nearly every day and specifically remembered a wedding party in 8C on the evening of Mr. Cavello's marriage. Avri Ohana also recalled that Mr. Cavello moved in shortly after Mr. Ohana's arrival in August 1980.

Joel Hinman recalled meeting Mr. Cavello in the fall of 1980, when Mr. Cavello said that he was living in 8C and told Mr. Hinman to come to him with complaints. Mr. Hinman recalled going to 8C in the middle of the night to complain about heat and having conversations with a woman. Loren Calaway also recalled knocking on the door of 8C sometime in 1980 at about 10 p.m. to report on an incident involving the police's search for a thief. At that time, Mr. Calaway heard a television inside the loft and someone moving around but could not get anyone to answer the door. Mr. Calaway also remembered seeing a woman whom he believed to be Mrs. Cavello carrying groceries up in the elevator. Marie-Paule Fauque (9W) also recalled meeting Mr. Cavello in approximately 1980 when he repaired a leaky radiator. She was also in 8C and observed a kitchen, a living area, and a dog.

Kim Steele testified that, in late 1980 or early 1981, he complained abut a leak coming from 8C and, with Mr. Cavello, looked at the hot water heater and toilet in 8C. Mr. Steele recalled seeing a kitchen and a bathroom at that time. Rina Peleg attended a party in 8C in October or November 1980 given by Mr. and Mrs. Cavello. On this occasion, Ms. Peleg observed a refrigerator, a stove, a kitchen counter, a living room area with a sofa and a table, and a sleeping area with what appeared to be a loft bed. Similarly, Marilyn Manos, who also visited the Cavellos in 8C, recalled seeing a large open door with plants and a kitchen counter and cooking area, a walk-in closet with clothing, and a sleeping loft above the closet. Ms. Manos also recalled hearing noise from 8C at all hours of the day and on weekends.

Charles Searles recalled eliciting Mr. Cavello's help early on a Sunday morning in 1982 when a friend dropped some keys down the elevator shaft. Robert Rossiter also recalled going to 8C to complain and having the door answered by a woman.

Peter Neptune, an actor and director, testified that he was shown 8C in August 1982 by a real estate agent. At that time, Luis Cavello was in the process of moving out. Mr. Neptune observed a kitchen with a stove, sink and refrigerator; a bathroom with a toilet, sink, and shower; and a loft bed with a closet underneath. Mr. Neptune executed a two-year lease for 8C, commencing September 1982, and moved into 8C during the last week of September 1982, approximately two weeks after Mr. Cavello had vacated.

Since he moved into 8C, Mr. Neptune has slept there nearly every night and eaten at least one meal per day there. Mr. Neptune produced several documents dated 1982 through 1985 supporting his own claim of residential occupancy, but produced no documents as to Mr. Cavello's occupancy.

9E

The window period occupant of unit 9E also failed to appear at the hearing because he was allegedly in Ossining State Prison. However, other tenants offered testimony about the occupants of the loft in 1980 and 1981. Marie-Paul Fauque, the other occupant of the ninth floor, testified that Michael Giovanni and his girlfriend moved into 9E after Ms. Fauque arrived in the building in 1979. She was later invited into Mr. Giovanni's loft and observed a bedroom, a kitchen, a bathroom, a bar, and walls painted pink. Ms. Fauque stated that Mr. Giovanni was arrested for manslaughter in 1982 and was subsequently evicted.

Avri Oshana visited 9E in 1980 and observed pink paint and pink couches. Rina Peleg also visited 9E in October 1980 to drill a hole and hang something from her ceiling. She saw a bedroom; a kitchen with a bar counter, sink, and a small refrigerator; a bathroom with towels on the racks; and closets. Kim Steele also recalled visiting 9E for a party and saw a pink

living room with tables and couches, a kitchen with a bar and sink, and two bathrooms.

Temple Smith testified that she and Phoebe Rentschler met Martin Fine at a party in May 1982 and told him they were looking for a place to live. Soon afterwards, Mr. Fine called Ms. Rentschler and told her he would have a place available soon. Later in May Ms. Smith and Ms. Rentschler went to 640 Broadway and were shown both 9E and 8C by Cavello. When she first saw 9E, Ms. Smith noted that it was painted pink. She also saw two bathrooms, one with a toilet and sink and one with a shower, sink, and water heater; a kitchen with a bar of black formica, and a double sink; a large built-in closet filled with towels, make-up, and underwear; and mattresses and box springs on the floor.

Martin Fine told Ms. Smith that the prior tenant had been recently evicted and that no fixture fee would be charged. Ms. Smith and Ms. Rentschler then executed a two-year lease commencing June 1, 1982. When Ms. Smith objected to the lease listing "photography studio" as the use and stated she would be living in the loft, Mr. Fine said that this was because of the building's commercial zoning.

In June or early July 1982, Ms. Smith and Ms. Rentschler hired a contractor to renovate the unit and he constructed three separate bedrooms. On September 15, 1982, Ms. Smith moved into 9E and resided there until October 1, 1984, when she left the country until the summer of 1985. Ms. Rentschler has also resided there since September 1982. In support of her claim of residential occupancy, Ms. Smith produced various documents and photographs dated 1982 through 1984, but produced no documents pertaining to the window period occupancy.

9W

Marie-Paule Fauque, a jewelry designer, testified that she answered a *Village Voice* ad in the early spring of 1979 for lofts to rent at 640 Broadway. She and her boyfriend, Ed Bertoglio, looked at many lofts and decided to rent 9W. With her business manager and accountant, Ms. Fauque then met with Martin Fine to negotiate a lease. Ms. Fauque and her business manager asked for a clause in the lease acknowledging that the use was residential, but Mr. Fine refused, although assuring them that the building was then in the process of procuring a residential certificate of occupancy. She executed a five-year lease commencing in May 1979.

Soon afterwards, Ms. Fauque and Mr. Bertoglio began renovating the space. They installed a bathroom, with a tile floor, toilet, sink, bathtub, and a shower; a kitchen with a refrigerator, a dishwasher, and an electric stove; a washer and dryer; and carpeting and linoleum on the floors. During this construction work, Ms. Fauque recalled Mr. Fine visiting and asking her to cook for him one night. In early July 1979, Ms. Fauque and Mr. Bertoglio moved into the loft, throwing a huge housewarming party.

Ms. Fauque testified that her electrical service was initially residential. However, approximately one and one-half years prior to the hearing, Con Edison visited the loft and changed the service to commercial because people live and work in the loft. At the time, Ms. Fauque stated she had two assistants working with her in the loft. Sometime in 1984, Ms. Fauque moved her jewelry design business across the street to 59 Bleecker Street, where she established a showroom and gallery. She continues to use 640 Broadway as a studio where she creates her jewelry samples. Ms. Fauque testified that she is not a United States citizen and has had no other residence but 640 Broadway.

Several other tenants testified to Ms. Fauque's occupancy of 9W. Andrea Vignoli stated that he was a friend of Mr. Bertoglio and visited the loft several times from 1979 on. He observed a kitchen with a bar, a platform bed, and a living area. Joel Hinman visited 9W in the summer and fall of 1979 and saw a bedroom and a kitchen. Robert Rossiter recalled attending a party in 9W in 1979. Kim Steele also visited the loft in 1980 and saw a work and office area, a kitchen with fixtures, a bathroom, a bedroom, a washer and dryer, and white linoleum floors.

In support of her claim of residential occupancy, Ms. Fauque submitted the following documents: (1) March and April 1980 New York Telephone bills; (2) May 1980 doctor's bills; (3) a May 1980 bank statement; (4) an August 1980 Con Edison bill indicating residential service; (4) a September 5, 1980, health spa contract; and (5) a December 5, 1980, medical bill.

POST-HEARING MEMORANDA

Subsequent to the last hearing date of September 16, 1985, several memoranda of law were filed by Richard Givens, Esq., on behalf of the owner; by Deirdre Carson, Esq, on behalf of all tenants except Guillermo Gleizer; and by Guillermo Gleizer, *pro se*.

Mr. Givens filed his "First Written Offer of Proof" on November 6, 1985. By this memorandum, the owner sought to adduce evidence on (1) the lack of a public emergency requiring implementation of Article 7-C; (2) Article 7-C's undue burden on interstate commerce; (3) the inadequacy of artist certification as a basis for compulsory residential conversion; (4) the financial hardship of compliance with Article 7-C on the owner; and (5) the impropriety of the Loft Board as an adjudicative body. The owner also raised the following defenses to coverage: (1) that the failure of some

tenants to file New York City income taxes or to list 640 Broadway as their residence on their federal income taxes requires denial of coverage; (2) that the tenants are estopped from seeking coverage by their signing leases prohibiting residential use; (3) that coverage would impose involuntary servitude upon the owner; (4) that to require a special permit to be sought would violate due process; (5) that a compulsory zoning change would violate due process and be unconstitutional as applied; and (6) that coverage would deny the owner equal protection by treating it worse than owners who were granted special permits or than public utilities which are permitted a 14% return on investment.

On November 13, 1985, the hearing officer indicated that she would recommend denial of the owner's first offer in its entirety. She concluded (1) that the Board lacked jurisdiction to consider the constitutional issues; (2) that evidence on a public emergency and on the legality of the artist certification requirement was not relevant to coverage; (3) that the owner's failure to timely file a hardship application as required by the Board's regulations precluded consideration of any hardship claims; and (4) that the Board lacked jurisdiction to adjudicate the equitable defense of estoppel.

The owner filed a "Second Written Offer" a few months later, on January 27, 1986. This memorandum requested findings as to whether certain facts, nearly all of which had occurred on the record during the hearings, had actually taken place. On February 14, 1986, the hearing officer also denied the owner's second offer in its entirety on the grounds that such preliminary findings were improper. The owner's "Third Written Offer of Proof" was filed on May 5, 1986, contending that transcription of the hearings would cost $15,000 and require three months to prepare and that therefore the second offer should be accepted. The hearing officer denied the third offer on May 9, 1986.

Guillermo Gleizer filed three *pro se* post-hearing memoranda. The first, filed on May 6, 1986, contended that (1) he was the prime lessee of unit 4W and 4WR, (2) 4WR was unoccupied until May 1, 1980, and Mr. Gleizer occupied 4WR as a warehouse and projected photography studio until June 1, 1980; (3) Charles Gifford occupied 4WR as an architectural studio; (4) Juliet Holland was not the residential occupant of 4WR because she filed her taxes with a Connecticut address and had her bank, stockbroker, accountant, and doctor in Connecticut; (5) Mr. Gleizer has the right to reclaim 4WR under Subletting Regulations Section B.4; (6) Article 7-C is an unconstitutional impairment of the obligation of contracts; and (7) the Board's subletting regulations are a nullity, having been promulgated without authority.

Mr. Gleizer filed a second brief on May 5, 1987, containing similar contentions: (1) that Mr. Gifford did not residentially occupy unit 4WR; (2) that Ms. Holland was not the residential occupant qualified for protection because she offered inadequate proofs of residential occupancy; (3) that Ms. Holland's residential occupancy was precluded by her sublease; and (4) that Mr. Gleizer's pending holdover action against Ms. Holland, filed on September 1, 1984, permitted him to reclaim 4WR under Subletting Regulation Section B.4. In this brief, Mr. Gleizer also contended, apparently for the first time, that 4WR was a covered IMD unit, having been residentially occupied by Mr. Gleizer from March 1980 to mid-1982. Mr. Gleizer enclosed with this brief his 1980-1981 Con Edison bills, his 1980-1981 telephone bills, his driver's license (expiring in 1984), and a 1984 insurance card.

In July 1987, Ms. Susan Kornhauser, the hearing officer who presided over the hearings, left the employ of the Loft Board and the case was reassigned to hearing officer John Spooner.

On November 20, 1987, the tenants' attorney, Deirdre Carson, Esq., filed her voluminous brief, consisting of 171 pages of text and 50 additional pages of indices of the hearing tapes and exhibits. This brief contended that all of the units upon which evidence was offered, with the exception of 4WF occupied by Mr. Gleizer, were covered IMD units. In addition, the tenants contended that (1) any units first residentially occupied before April 1, 1981, were accreted units under Coverage Regulations Section I(6)(1)(c); (2) the owner's application for a zoning variance constituted an admission of residential occupancy; (3) coverage may be granted contingent upon ultimate approval of a special permit by City Planning; (4) the Board should find that all of the floor area of the building, from the second through the ninth floors, was residentially occupied on September 1, 1980; (5) implementation of the 1987 amendment to Article 7-C (M.D.L. Section 281(4)) requires a finding of residential occupancy as of September 1, 1980, for units 9E, 2E, 8W, and 7E; (6) the present occupants of the units should be found to be protected under Article 7-C; (7) the question of whether certain units meet the minimum size requirements of the zoning resolution does not preclude coverage but is a matter to be resolved in legalization; and (8) the 1987 amendments to the joint living-work quarters for artists regulations renders moot the owner's objections as to the artist certification process.

The owner responded to the tenants' contentions on December 23, 1987. In its memorandum, the owner contended that the tenants had failed to establish residential occupancy of the premises because (1) their testimony of residential use contradicted the terms of their leases, which created a presumption of commercial use; (2) the tenants of units 4E, 4WR, 5E, 8E, and 9W had failed to file New York City income tax returns; and (3) the utility bills are hearsay and inadequate indicia of residential use. The owner further contended that (1) undersized units cannot be covered; (2) zoning and statutory amendments cannot be applied

retroactively; and (3) the new hearing officer to whom the case was reassigned was unable to observe the witnesses' demeanor and therefore unqualified to recommend findings on the case. Finally, the owner requested a copy of any report submitted by the hearing officer to the Loft Board.

On January 7, 1988, Mr. Gleizer filed his third brief in response to that filed by the owner. In this brief, Mr. Gleizer argued that (1) he has not physically left the premises as the owner alleges; (2) the owner's $1.5 million lawsuit against the 640 Broadway tenants for falsely representing they planned to use their units commercially is inconsistent with their present allegations of non-residential use; (3) Mr. Gleizer is a residential occupant qualified for protection; (4) if 4WR is an IMD unit, Mr. Gleizer is also the protected occupant; (5) Mr. Gleizer received inadequate notice of the hearings and was deprived of an opportunity to cross-examine most of the other tenants.

OPINION:

This case, by its sheer size alone, has been one of the most burdensome the Loft Board has been called upon to adjudicate. The number of allegedly residential units, the imposing array of witnesses, and the daunting volume of documents will preserve the case in the annals (as well as the file cabinets) of the Board for years to come. Indeed, the original coverage application, filed soon after the creation of the Loft Board, has been with the Board longer than most of the present members or staff. And yet, despite what the owner's vigorous opposition papers would suggest, the issues in the case itself are surprisingly straightforward, both factually and legally.

Perhaps the most complicated issue raised by this case, once the stacks of documents and weeks of testimony have been sorted through, is the status of the alleged residential

occupancy under the Zoning Resolution. Article 7-C can cover only those buildings in which the Zoning Resolution permits "residential use as of right." M.D.L. Section 281(2). In a building of this size located on Broadway, the Zoning Resolution permits residential use only under a special permit granted for joint living-work quarters for artists, Zoning Resolution Section 42-14B((1)(b), with the requirements being significantly simplified where the City Planning Commission determines that floor area in the building was occupied as dwelling units or joint living-work quarters for artists on September 1, 1980. Zoning Resolution Section 74-782. In addition, to satisfy the "artist" requirement, occupants must either be certified as artists by the Department of Cultural Affairs or have filed an application with Cultural Affairs by October 8, 1987, alleging residency as of September 15, 1986. Zoning Resolution Section 12-10 (amended effective January 8, 1987).

According to the City Planning Commission files, a special permit and artist/non-artist certifications were timely filed and remain pending for all of the units included in this coverage proceeding.* Although the owner insists that the absence of a granted special permit automatically precludes coverage, this is inaccurate. Under M.D.L. Section 281(2)(iv), "interim multiple dwellings" include "buildings, structures, or portions thereof which may be converted to residential use pursuant to a special permit granted by a local planning agency." Moreover, the Board regulations include as IMD units

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* Applicants' attorney has requested that the Board make a special certification of residential occupancy as of September 1, 1980, for the benefit of the City Planning Commission's consideration of the pending special permit. This the Board declines to do, since it would appear to usurp the fact-finding authority of that agency and is unnecessary to a determination of coverage.

those units "in which the residential use may become a use as of right as a result of approval of a grandfathering application, in accordance with Section 281(i) or (iv)." Coverage Regulations Section I(b)(1)(a). Artist certification, too, is excluded as a requirement for coverage, and can lead to an exemption only where the current occupant lacks the necessary certification "at the time of issuance of the final certificate of occupancy." Coverage Regulations Section I(E)(3).

Thus, as past Board decisions have made clear, the Board may adjudicate coverage as long as residential use as-of-right may be granted under the special permit process of Zoning Resolution Section 74-782, whether or not the residential use has presently been approved or not. *See In the Matter of the Application of Vita Holdings Ltd.*, Loft Board Order No. 176 (March 6, 1985); *In the Matter of the Application of 475 Broadway*, Loft Board Order No. 169 (February 6, 1985) (premises covered with continued coverage dependent the granting of a special permit by City Planning); *In the Matter of the Application of 473 Broadway*, Loft Board Order No. 171 (February 6, 1985) (same); *In the Matter of the Application of Max Landau*, Loft Board Order No. 108 (August 1, 1984) (same); *In the Matter of the Application of Morrie Golick*, Loft Board Order No. 72 (March 21, 1984). *See also Missry v. New York City Loft Board*, December 16, 1987, NYLJ, p. 12, col 6., p. 12, col 1 (New York Supreme Court). (Loft Board may require owner to procure City Planning ruling on residential use prior to seeking decoverage.) The pending special permit and artist/non-artist certification are thus sufficient to permit coverage of all of the affected units, with continued coverage dependent upon the subsequent granting of a special permit and the necessary certifications.

The minimum floor coverage issue raised by the owner also does not prohibit coverage under Article 7-C. It is true that M.D.L. Section 277(7)(a)(i) requires that joint living-work quarters for artists contain 1200 square feet of interior space,

while Zoning Resolution Section 15-026 (enacted September 25, 1986) permits joint living-work quarters for artists to contain 415 or 600 square feet if certain requirements are met. However, as the Board has held in past decisions, the issue of a unit's size is a question to be addressed in legalization and does not preclude coverage under Article 7-C. *In the Matter of the Application of William Barvin,* Loft Board Order No. 642 (September 11, 1987). Thus, even assuming some of the units are less than the required minimum size, this fact would not affect the coverage question at issue here.

The owner also argues that none of the Zoning Resolution provisions can be applied "retroactively" so as to permit coverage. There is clearly no retroactivity issue as to minimum size, since that is irrelevant to coverage no matter what version of the resolutions is used. There is likewise no retroactivity issue as to the artist/non-artist certifications, as amended by Zoning Resolution Section 12-10 (January 8, 1987). As already discussed, the Board's own regulations, as well as prior decisions, make clear that the absence of certification does not prevent coverage, even though a lack of certification may result in decoverage if it continues until the issuance of the final C of O. *See* Coverage Regulations Section I(E)(3); *In the Matter of the Application of Milne,* Loft Board Order No. 114 (August 29, 1984).

Thus the sole retroactive application that could possibly affect the coverage determination itself is that of the 1987 amendment to Article 7-C, M.D.L. Section 281(4), which might permit coverage even though certain requirements of the applicable zoning law were not met. However, in light of the compliance with the Zoning Resolution, it is thus unnecessary to address the tenants' arguments as to the applicability of the this amendment to Article 7-C.

In opposition to the implementation of Article 7-C to this particular building, the owner has raised a host of

constitutional objections, including arguments that application of the statute would constitute an undue burden on state commerce, involuntary servitude, denial of due process, and denial of equal protection. In addition, the owner raised the equitable defense of estoppel. The constitutionality of Article 7-C has already withstood most of the attacks now raised by the owner. *See Spring Realty Co. v. New York City Loft Board,* 69 N.Y.2d 657 (1987), *cert. denied,* __ U.S. __ (1987). In any case, as the hearing officer properly held, these constitutional and equitable issues cannot be adjudicated by the Loft Board since they lie outside its limited jurisdiction to implement and enforce Article 7-C. For that reason, all of the owner's constitutional and equitable objections and defenses must be dismissed.

Behind the bluster of the owner's voluminous constitutional and procedural challenges to coverage lies the indisputable fact that the owner's conduct and statements, from 1978 when it purchased the building until at least 1982, expressly recognized the residential use of the upper eight floors. During this time, according to the credible and unrebutted testimony of nearly all the tenants, the owner was leasing the space for "lofts" and even had some tenants (specifically Ms. Eshel) fill out application forms asking about roommates and pets, hardly items of concern for commercial tenancy. At the same time the owner's employees were personally assuring tenants that it was not only acceptable but preferable for them to live in the building, going so far as to approve floor plans for kitchens and bathrooms, recommend electricians and plumbers, and help procure homeowner's insurance.

Along with this conduct, the owner retained an architect in 1978 to commence a series of proceedings with the Department of Buildings, the Board of Standards and Appeals, and finally the City Planning Commission to legalize the building for residential use. In 1982, the owner stated in an

application to City Planning that, since 1976, it had completely failed to find conforming use tenants, an admission that the present occupants were non-conforming and, presumably, residential. In support of this same application, the owner supplied documentary proofs solicited directly from the tenants, that most of the building was occupied residentially as of September 1, 1980. Given these clear acknowledgments of the residential use of the building from 1978 continuing throughout 1980 and 1981, it is difficult, indeed, to see how the owner can now contest the tenants' coverage application on the grounds of inadequate proofs. In truth, the past statements of the owner are the strongest evidence possible of residential occupancy.

Turning to the actual evidence of residential occupancy with this in mind, it becomes clear that the proofs of most of the units, buttressed as they are both by the admissions of the owner, and adequate documentation,* are more than sufficient to establish residential occupancy for the entire window period. Thus, the credible testimony concerning units 2W, 2WB, 3W, 4E, 5W, 5E, 6E, 6WB, 6WF, 7E, 7W, 7C, 8W, and 9W establishes that these units were residentially occupied from April 1, 1980, until December 1, 1981. Two other units, 2E and 8E, which, according to the proofs and credible testimony offered, were occupied residentially before April 1, 1981, through December 1, 1981, constitute accreted units and are also found to be covered by Article 7-C pursuant to M.D.L. Section 281(3).

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* The owner's attacks upon the documentation as either inadequate (in the case of certain tenants who failed to produce tax returns) or hearsay (in the case of utility records) are less than convincing. In any event, except as discussed above, any deficiencies in documentation have been remedied by the credible testimony of the tenants themselves.

Three units, 3E, 8C and 9E, present a slightly closer question. Not only did the window period occupants of these units fail to testify at the hearings, but little or no documentary evidence was presented to buttress the other tenants' testimony concerning 1980-1981 residential use. Even though seven tenants and Ms. Diether all testified that they visited Richard Yoder in unit 3E at various times between 1978 and 1985 and knew he resided there with his family, up until the time of the hearing, Mr. Yoder did not testify nor were any documents presented to support a claim of residential use. Likewise, the evidence of the residential occupancy of 8C by Luis Cavello, the alleged building superintendent, consisted solely of the testimony of ten tenants who visited him at various times in 1980, 1981, and 1982. And similarly, although four tenants recalled visiting unit 9E in 1980 when Michael Giovanni lived there, neither Mr. Giovanni's testimony nor any documentary proofs were offered to support this claim. Nevertheless, it is found that the tenants' testimony, which is found to be credible, when considered in light of the owner's admissions of the residential use of the entire building for this period, is sufficient to establish that these three units were residentially occupied for the entire window period, in the case of 3E, or as accreted units from April 1, 1981, until December 1, 1981, in the case of 8C and 9E, and are therefore also found to be covered.

Finally, as to units 4WF and 4WR, an analysis of the conflicting testimony makes it apparent that only unit 4WR can be covered. Three tenants testified that 4W was initially lived in by Allen Barr, who vacated in March 1980. According to the testimony of Mr. Gleizer, he then residentially occupied 4WF from May 1980 up until May 1981, when he sublet the space from May 1981 until May 1982 to Bruce Jope, who Mr. Gleizer testified used the space as an office while he continued to live in Wilmington, Massachusetts. Even though Mr. Gleizer indicated that Mr. Jope might have stayed in 4WF occasionally for two or three days at a time, he stated that the residence of

Mr. Jope continued to be Massachusetts. Although other aspects of Mr. Gleizer's testimony with regard to the rear unit are found not to be credible, as discussed below, his testimony as to the window period occupancy of 4WF, is found to be credible and, since this was the sole evidence adduced on this factual issue during the hearings, unit 4WF is found *not* to have been residentially occupied during the window period and the coverage application as to this unit must be denied.

As to 4WR, Mr. Gleizer testified that he sublet this unit to Charles Gifford from May 1980 until March 1982. Mr. Gleizer denied that Mr. Gifford lived in 4WR. However, in light of Mr. Gifford's testimony as well as that of one other tenant, Mr. Gleizer's denials of residential use are found not to be credible. Instead, based upon the credible testimony of Mr. Gifford and Mr. Hinman, unit 4WR is found to have been residentially occupied throughout the window period and therefore must also held to be covered.

There exists one further issue concerning 4WR which requires adjudication. At the hearing and in his post-hearing submissions, Mr. Gleizer insists that he, rather than Juliet Holland, the tenant since June 1, 1982, is the residential occupant entitled to protection. Ms. Holland denies that Mr. Gleizer has any rights to the unit, credibly testifying that she has lived in the unit since approximately June 1, 1982.* Under the Board's subletting regulations, where the present residential occupant took possession prior to June 21, 1982, as Ms. Holland did, she is the occupant qualified for Article 7-C protection. Subletting Regulations Section B(1) and (2). Thus,

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* Although Mr. Gleizer argues that Ms. Holland resided in Connecticut not New York, he has raised at most, an issue of primary residence which is not relevant to a coverage proceeding. *See Bor Realty Corp. v. New York City Loft Board*, __ N.Y. 2d __ (September 8, 1987).

Juliet Holland and not Mr. Gleizer must be found to be the protected occupant of unit 4WR.*

Turning finally to the owner's and Mr. Gleizer's procedural arguments as to improprieties in the procedures followed in resolving the case, none of the contentions made, even if true, rise to the level of due process violations. The owner argues that the new hearing officer, assigned to this case in July 1987 upon the departure of the hearing officer who presided over the 1985 hearings, is unqualified to make recommended credibility findings. However, it is well-settled that the constitutional right to due process and a fair hearing "does not require that the actual taking of evidence be before the same officer who makes the final determination." *Rothkoff v. Ratner,* 104 Misc. 2d 204, 206, 428 N.Y.S. 2d 138, 140 (N.Y. Co. S. St., 1980). The only essential requirement is that the officer who makes the decision review all of the evidence. *Id.* Mr. Spooner, the hearing officer who prepared the proposed opinion and order in this case upon Ms. Kornhauser's departure from the office, reviewed the entire case file, including documents and tapes of hearing testimony, and conferred with Ms. Kornhauser. He is thus capable of making the final credibility and legal determinations necessary for resolution of the case.**

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* Although the applicants seek an adjudication of the protected occupant status for each applicant, this is an issue which the Board has indicated will be adjudicated only when necessary and not as an attendant ruling of every coverage case. *See In the Matter of the Application of William Muschel,* Loft Board Order No. 33 at pp. 12-13 (November 23, 1983). Moreover, since all of the protected occupant disputes, with the exception of 4W, have been withdrawn, universal protected occupant determinations seem unnecessary.

** The owner's request for a copy of the hearing officer's recommended findings must also be denied since these findings are internal agency communications, preliminary to the actual resolution of the case. Both

(Footnote continued)

Mr. Gleizer argues that he was denied due process by the lack of notice of the hearings and was therefore unable to cross-examine some witnesses at all and unprepared to cross-examine Mr. Gifford. First of all, Mr. Gleizer was present at the conference when the original hearing dates were set. It was apparent at that time that, because of the large number of parties and attorneys concerned, the hearing officer could not possibly send out written notices each time a new hearing date was set or adjourned and reset. Rather, it was the parties' obligation to keep informed of the entire hearing schedule. As to the supposed "other witnesses" Mr. Gleizer was unable to cross-examine, Mr. Gleizer made no attempt to recall any of tenants who had already testified or, indeed, to call any witnesses whatsoever to support his claims as to 4WF and 4WR. It is thus Mr. Gleizer's failure to even attempt to call any witnesses, rather than any failure of notice of other hearing dates, which is responsible for the absence of evidence as to his unit. In any case, Mr. Gleizer was clearly informed of the days testimony was taken on 4WF and 4WR, since he was present on all of these days. Having been present on these days, he cannot now complain about deficiency of notice.

Mr. Gleizer's insistence that he was denied a fair opportunity to cross-examine Mr. Gifford is also meritless. The truth is that Mr. Gleizer conducted a lengthy and thorough cross-examination of Mr. Gifford concerning most of the topics testified to on direct. Only once did he make specific reference to a document which he needed to conduct his cross-examination, and this was supplied by Ms. Carson. The record thus belies his claim that he was somehow "unprepared." As to Mr. Gleizer's contention that he intended to retain an attorney to cross-examine Mr. Gifford at some future time, it need only

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parties will receive copies of the final order, which is all the Board's procedural regulations require.

be pointed out that Mr. Gleizer had several years to retain an attorney and thereby waived any right to complain about lack of legal representation.

Thus, because 640 Broadway meets the statutory criteria of an "interim multiple dwelling," in that at least three units were residentially occupied during the window period, it is found to be covered by Article 7-C, with units as described above.

ORDER:

It is hereby ordered that Docket No. TR-0092 is granted to the extent that 640 Broadway is determined to be an interim multiple dwelling consisting of 20 units: 2E, 2W, 2WB, 3E, 4E, 4WR, 5E, 5W, 6E, 6W, 6WR, 7E, 7W, 7C, 8E, 8W, 8C, 9E, and--. The owner is ordered to register the premises as an IMD with the Loft Board accordingly. Continued coverage of the premises is contingent upon the granting of a special permit by the Planning Commission.

It is further ordered that Docket No. TR-0092 is denied as to unit 4WF.

It is further ordered that Juliet Holland is protected occupant of Unit 4WR.

It is further ordered that Docket No. TR-0365 is hereby dismissed with prejudice.

DATED: April 28, 1988

Date Loft Board Order Mailed: May 10, 1988

/s/

Members Concurring: Chairman Dole; Cooke; DeLaney; Navare, Nemaizer (5)

Members Dissenting: Liebman (1)

Members Absent: Iacobazzo; Martinez (2)

NOTICE

A party aggrieved by a determination of the Loft Board may file an application for reconsideration of a determination within thirty (30) days of service of the determination on the parties (i.e., said application must be received at the Board offices within 30 days of the date the Order was mailed as indicated above). The Board, may in its discretion, reconsider such determination.

Filing of an application for reconsideration shall not toll the statute of limitations for purposes of initiating an Article 78 proceeding.

ARTICLE 7-C-LEGALIZATION OF INTERIM MULTIPLE DWELLINGS

Section

280. Legislative findings.
281. Definition of "interim multiple dwelling".
282. Establishment of special loft unit.
283. Occupancy permitted.
284. Owner obligations.
285. Owner protection.
286. Tenant protection.
287. Alternative compliance.

§ 280. Legislative findings.

The legislature hereby finds an declares that a serious public emergency exists in the housing of a considerable number of persons in cities having a population of over one million which emergency has been created by the increasing number of conversions of commercial and manufacturing loft buildings to residential use without compliance with applicable building codes and laws and without compliance with local laws regarding minimum housing maintenance standards; that many such buildings do not conform to minimum standards for health, safety and fire protection; that housing maintenance services essential to maintain health, safety and fire protection are not being provided in many such buildings; that as a consequence of the acute shortage of housing as found and declared in the emergency tenant protection act of nineteen seventy-four[1] the tenants in such buildings would suffer great hardship if forced to relocate; that as a result of the uncertain status of the tenancy in question the courts have been increasingly burdened with disputes between landlords and tenants regarding their respective rights and obligations under the existing circumstances; that some courts have declared such buildings "de facto" multiple dwellings; that illegal and

unregulated residential conversions undermine the integrity of the local zoning resolution and threaten loss of jobs and industry; that the intervention of the state and local governments is necessary to effectuate legalization, consistent with the local zoning resolution, of the present illegal living arrangements in such "de facto" multiple dwellings, and to establish a system whereby residential rentals can be reasonably adjusted so that residential tenants can assist in paying the cost of such legalization without being forced to relocate; that in order to prevent uncertainty, hardship, and dislocation, the provisions of this article are necessary and designed to protect the public health, safety and general welfare.

§ 281. Definition of "interim multiple dwelling"

1. Except as provided in subdivision two of this section, the term "interim multiple dwelling" means any building or structure or portion thereof located in a city of more than one million persons which (i) at any time was occupied for manufacturing, commercial, or warehouse purposes; and (ii) lacks a certificate of compliance or occupancy pursuant to section three hundred one of this chapter; and (iii) on December first, nineteen hundred eighty-one was occupied for residential purposes since April first, nineteen hundred eighty as the residence or home of any three or more families living independently of one another.

2. Notwithstanding the definition set forth in subdivision one of this section, the term "interim multiple dwelling" includes only (i) buildings, structures or portions thereof located in a geographical area in which the local zoning resolution permits residential use as of right, or by minor modification or administrative certification of a local planning agency, (ii) buildings or structures which are not owned by a municipality, (iii) buildings, structures or portions thereof within an area designated by the local zoning resolution as a

study area for possible rezoning to permit residential use, or (iv) buildings, structure or portions thereof which may be converted to residential use pursuant to a special permit granted by a local planning agency. In the case of classes of buildings specified by paragraphs (iii) and (iv) of this subdivision and those buildings specified by paragraph (i) of this subdivision which require a minor modification or administrative certification, however, the provisions of subdivision one of section two hundred eighty-four of this article regarding compliance with this chapter shall not be applicable, but the other provisions of this article shall be applicable. Upon rezoning of any such study area or the granting of any such special permit, minor modification or administrative certification to permit residential use of any such building or portion thereof, subdivision one of section two hundred eighty-four of this article shall be applicable, with the timing of compliance requirements set forth in such section commencing to run upon the effective date of such rezoning or permit approval. If such rezoning does not permit residential use of the building or a portion thereof, or if a special permit, minor modification or administrative certification is denied, such building shall be exempt from this article.

3. In addition to the residents of an interim multiple dwelling, residential occupants in units first occupied after April first nineteen hundred eighty and prior to April first, nineteen hundred eighty-one shall be qualified for protection pursuant to this article, provided that the building or any portion thereof otherwise qualifies as an interim multiple dwelling, an the tenants are eligible under the local zoning resolution for such occupancy. A reduction in the number of occupied residential units in a building after December first, nineteen hundred eighty-one shall not eliminate the protections of this article for any remaining residential occupants qualified for such protections. Non-residential space in a building as of the effective date of the act which added this article[1] shall be offered for residential use only after the obtaining of a

residential certificate of occupancy for such space, and such space shall be exempt from this article, even if a portion of such building may be an interim multiple dwelling.

4. Interim multiple dwellings shall also include buildings, structures or portions thereof that had residential occupants on May first, nineteen hundred eighty-seven in units occupied residentially since December first, nineteen hundred eighty-one that were occupied for residential purposes since April first, nineteen hundred eighty and those units shall be qualified for protection pursuant to this article, provided that the building or any portion thereof meets the requirements set out in subdivision one of this section, regardless of whether the buildings, structures or portions thereof meets the requirements set out in paragraphs (i), (iii) and (iv) of subdivision two of this section.

§ 282. Establishment of special loft unit

In order to resolve complaints of owners of interim multiple dwellings and of residential occupants of such buildings qualified for the protection of this article, and to act upon hardship applications made pursuant to this article, a special loft unit referred to herein as the "loft board" shall be established which shall consist of from four to nine members representative of the public, the real estate industry, loft residential tenants, and loft manufacturing interests, and a chairperson, all to be appointed by the mayor of the municipality and to serve such terms as he may designate. The compensation of the members of the loft board shall be fixed by the mayor. The members of the loft board shall not be considered employees of the state or the municipality, provided, however, that state or municipal employees, or officers may be named to the loft board. The mayor shall establish the loft board within ninety days of the effective date of the act which added this article[1] The loft board shall have such office and staff as shall be necessary to carry out

functions conferred upon it and may request and receive assistance from any state or municipal agency or department. The loft board shall have the following duties: (a) the determination of interim multiple dwelling status and other issues of coverage pursuant to this article; (b) the resolution of all hardship appeals brought under this article; (c) the determination of any claim for rent adjustment under this article by an owner or tenant; (d) the issuance, after a public hearing, and the enforcement of rules and regulations governing minimum housing maintenance standards in interim multiple dwellings (subject to the provisions of this chapter and any local building code), rent adjustments prior to legalization, compliance with this article and the hearing of complaints and applications made to it pursuant to this article; and (e) determination of controversies arising over the fair market value or a residential tenant's fixtures or reasonable moving expenses. The violation of any rule or regulation promulgated by the loft board shall be punishable by a civil penalty determined by the loft board not to exceed one thousand dollars which may be recovered by the municipality by a proceeding in any court of competent jurisdiction. The loft board may charge and collect reasonable fees in the execution of its responsibilities. The loft board may administer oaths, take affidavits, hear testimony, and take proof under oath at public or private hearings.

§ 283. Occupancy permitted

Notwithstanding any other provision of this chapter or any other law code, rule or regulation, occupancy for residential purposes of residential units covered by this article is permitted, if such occupancy is in compliance with this article. Nothing contained herein shall be construed to limit local authorities from issuing vacate order for hazardous conditions, if appropriate.

§ 284. Owner obligations

1. (i) The owner of an interim multiple dwelling (A) shall file an alteration application within nine months from the effective date of the act which added this article[1], and (B) shall take all reasonable and necessary action to obtain an approved alteration permit within twelve months from such effective date, and (C) shall achieve compliance with the standards of safety and fire protection set forth in article seven-B of this chapter for the residential portions of the building within eighteen months from obtaining such alteration permit or eighteen months from such effective date, whichever is later, and (D) shall take all reasonable and necessary action to obtain a certificate of occupancy as a class A multiple dwelling for the residential portions of the building or structure within thirty-six months from such effective date. The loft board may, upon good cause shown, and upon proof of compliance with the standards of safety and fire protection set forth in article seven-B of this chapter, twice extend the time of compliance with the requirement to obtain a residential certificate of occupancy for periods not to exceed twelve months each.

(ii) If there is a finding by the loft board that an owner has failed to satisfy any requirement specified in paragraph (i) of this subdivision, such owner shall be subject to all penalties set forth in article eight of this chapter.

(iii) In addition to the penalties provided in article eight of this chapter, if there is a finding by the loft board that an owner has failed to satisfy any requirement specified in paragraph (i) of this subdivision, a court may order specific performance to enforce the provisions of this article upon the application of three occupants of separate residential units qualified for the protection of this article, or upon the application of the municipality.

(iv) If, as a consequence of an owner's unlawful failure to comply with the provisions of paragraph (i) of this subdivision any residential occupant qualified for protection pursuant to this article is required to vacate his unit as a result of a municipal vacate order, such occupant may recover from the owner the fair market value of any improvements made by such tenant, and reasonable moving costs. Any vacate order issued as to such unit by a local government shall be deemed an order to the owner to correct the non-compliant conditions, subject to the provisions of this article. Furthermore, when such correction has been made such occupant shall have the right to re-occupy his unit, and shall be entitled to all applicable tenant protections of this article.

(v) The occupants of a building shall, upon appropriate notice regarding the timing and scope of the work required, afford the owner reasonable access to their units so that the work necessary for compliance with this article can be carried out. Failure to comply with an order of the loft board regarding access shall be grounds for eviction of a tenant.

2. Every owner of an interim multiple dwelling, every lessee of a whole building part of which is an interim multiple dwelling, and every agent or other person having control of such a dwelling, shall, within sixty days of the effective date of the act which added this article[1], file with the loft board or any other authority designated by the mayor a notice in conformity with all provisions of section three hundred twenty-five of this chapter and with rules and regulations to be promulgated by the loft board.

§ 285. Owner protection

1. Notwithstanding the provisions of section three hundred two or three hundred twenty-five of this chapter, the owner of an interim multiple dwelling may recover rent payable from residential occupants qualified for the protection of this

article on or after April first, nineteen hundred eighty, and maintain an action or proceeding for possession of such premises for non-payment of rent, provided that he is in compliance with this article.

2. Notwithstanding any other provision of this article, an owner may apply to the loft board for exemption of a building or portion thereof from this article on the basis that compliance with this article in obtaining a legal residential certificate of occupancy would cause an unjustifiable hardship either because: (i) it would cause an unreasonably adverse impact on a non-residential conforming use tenant within the building or, (ii) the cost of compliance renders legal residential conversion infeasible. Residential and other tenants shall be given not less than sixty days notice in advance of the hearing date for such application. If the loft board approves such application, the building or portion thereof shall be exempt from this article, and may be converted to non-residential conforming uses, provided, however, that the owner shall, as a condition of approval of such application, agree to file an irrevocable recorded covenant in form satisfactory to the loft board enforceable for fifteen years by the municipality, that the building will not be re-converted to residential uses during such time. The standard for granting such hardship application for a building or portion thereof shall be as follows: (a) the loft board shall only grant the minimum relief necessary to relieve any alleged hardship with the understanding if compliance is reasonably possible it should be achieved even if it requires alteration of units, relocation of tenants to vacant space within the building, re-design of space or application for a non-use-related variance, special permit, minor modification or administrative certification; (b) self-created hardship shall not be allowed; (c) the test for cost infeasibility shall be that of a reasonable return on the owner's investment not maximum return on investment; (d) the test for unreasonably adverse impact on a non-residential conforming use tenant shall be whether residential conversion would necessitate displacement.

Such hardship applications shall be submitted to the loft board within nine months of the establishment of the loft board (or, in the case of interim multiple dwellings referred to in subdivision four of section two hundred eighty-one of this chapter, within nine months of the effective date of that subdivision)[1], but shall not be considered, absent a waiver by the loft board, unless the owner has also filed an alteration application. In determination of any such hardship application, the loft board may demand such information as it deems necessary. In approving any such hardship application, the loft board may fix reasonable terms and conditions for the vacating of residential occupancy.

3. An owner of an interim multiple dwelling shall be exempt from paying a conversion contribution required by the zoning resolution of the city of New York for that portion of any building or structure determined by the loft board to be an interim multiple dwelling.

§ 286. Tenant protection

1. It shall not be a ground for an action or proceeding to recover possession of a unit occupied by a residential occupant qualified for the protection of this article that the occupancy of the unit is illegal or in violation or provisions of the tenant's lease or rental agreement because a residential certificate of occupancy has not been issued for the building, or because residential occupancy is not permitted by the lease or rental agreement.

2. Prior to compliance with safety and fire protection standards of article seven-B of this chapter, residential occupants qualified for protection pursuant to this article shall be entitled to continued occupancy, and shall pay the same rent, including escalations, specified in their lease or rental agreement to the extent to which such lease or rental agreement remains in effect or, in the absence of a lease or rental agreement, the same rent most recently paid and accepted by

the owner; if there is no lease or other rental agreement in effect, rent adjustments prior to article seven-B compliance shall be in conformity with guidelines to be set by the loft board for such residential occupants within six months from the effective date of this article[1].

3. Upon or after compliance with the safety and fire protection standards of article seven-B of this chapter, an owner may apply to the loft board for an adjustment of rent based upon the cost of such compliance. Upon approval by the loft board of such compliance, the loft board shall set the initial legal regulated rent, and each residential occupant qualified for protection pursuant to this article shall be offered a residential lease subject to the provisions regarding evictions and regulation of rent set forth in the emergency tenant protection act of nineteen seventy-four,[2] except to the extent the provisions of this article are inconsistent with such act. At such time, the owners of such buildings shall join a real estate industry stabilization association in accordance with such act.

4. The initial legal regulated rent established by the loft board shall be equal to (i) the rent in effect, including escalations, as of the date of application for adjustment ("base rent"), plus, (ii) the maximum annual amount of any increase allocable to compliance as provided herein; and (iii) the percentage increase then applicable to one, two or three year leases as elected by the tenant, as established by the local rent guidelines board, and applied to the base rent, provided, however, such percentage increases may be adjusted downward by the loft board if prior increases based on loft board guidelines cover part of the same time period to be covered by the rent guidelines board adjustments.

5. An owner may apply to the loft board for rent adjustments once based upon the cost of compliance with article seven-B of this chapter and once based upon the obtaining of a residential certificate of occupancy. If the initial

legal regulated rent has been set based only upon article seven-B compliance, a further adjustment may be obtained upon the obtaining of a residential certificate of occupancy. Upon receipt of such records as the loft board shall require, the loft board shall determine the costs necessarily and reasonably incurred, including financing, in obtaining compliance with this article pursuant to a schedule of reasonable costs to be promulgated by it. The adjustment in maximum rents for compliance with this article shall be determined either (i) by dividing the amount of the cash cost of such improvements exclusive of interest and service charges over a ten year period of amortization, or (ii) by dividing the amount of the cash cost of such improvements exclusive of interest and service charges over a fifteen year period of amortization, plus the actual annual mortgage debt service attributable to interest and service charges in each year of indebtedness to an institutional lender, or other lender approved by the loft board, incurred by the owner to pay the cash cost of the improvements, provided that the maximum amount of interest charged includable in rent shall reflect an annual amortization factor of one-fifteenth of the outstanding principal balance. Rental adjustments to each residential unit shall be determined on a basis approved by the loft board. An owner may elect that the loft board shall deem the total cost of compliance with this article to be the amounts certified by the local department of housing preservation and development of such municipality in any certificate of eligibility issued in connection with an application for tax exemption or tax abatement to the extent such certificate reflects categories of costs approved by the loft board as reasonable and necessary for such compliance. Rental adjustments attributable to the cost of compliance with this article shall not become part of the base rent for purposes of calculating rents adjusted pursuant to rent guidelines board increases.

6. Notwithstanding any provision of law to the contrary, a residential tenant qualified for protection pursuant to this chapter may sell any improvements to the unit made or

purchased by him to an incoming tenant provided, however, that the tenant shall first offer the improvements to the owner for an amount equal to their fair market value. Upon purchase of such improvements by the owner, any unit subject to rent regulation solely by reason of this article and not receiving any benefits of real estate tax exemption or tax abatement, shall be exempted from the provisions of this article requiring rent regulation if such building had fewer than six residential units as of he effective date of the act which added this article[1], or rented at market value subject to subsequent rent regulation if such building had six or more residential units at such time. The loft board shall establish rules and regulations regarding such sale of improvements which shall include provisions that such right to sell improvements may be exercised only once for each unit subject to this article, and that the opportunity for decontrol or market rentals shall not be available to an owner found guilty by the loft board of harassment of tenants.

7. The local rent guidelines board shall annually establish guidelines for rent adjustments for the category of buildings covered by this article in accordance with the standards established pursuant to the emergency tenant protection act of nineteen seventy-four[2]. The local rent guidelines board shall consider the necessity of a separate category for such buildings, and a separately determined guideline for rent adjustment for those units in which heat is not required to be provided by the owner, and may establish such separate category and guideline. The loft board shall annually commission a study by an independent consultant to assist the rent guidelines board in determining the economics of loft housing.

8. Cooperative and condominium units occupied by owners or tenant-shareholders shall not be subject to rent regulation pursuant to this article.

9. No eviction plan for conversion to cooperative or condominium ownership for a building which is, or a portion of which is an interim multiple dwelling shall be submitted for filing to the department of law pursuant to the general business law until a residential certificate of occupancy is obtained as required by this article, and the residential occupants qualified for protection pursuant to this article are offered one, two or three year leases, as elected by such persons, in accordance with the provisions for establishment of initial legal regulated rent contained herein. Non-eviction plans for such buildings may be submitted for filing only if the sponsor remains responsible for compliance with article seven-B and for all work in common areas required to obtain a residential certificate of occupancy. Cooperative conversion shall be fully in accordance with section three hundred fifty-two-eeee of the general business law, the requirements of the code of the local real estate industry stabilization association, and with the rules and regulations promulgated by the attorney general.

10. The functions of the local conciliation and appeals board of such municipality regarding owners and tenants subject to rent regulation pursuant to this article shall be carried out by the loft board until such time as provided otherwise by local law.

11. Residential occupants qualified for protection pursuant to this article shall be afforded the protections available to residential tenants pursuant to the real property law and the real property actions and proceedings law.

12. No waiver of rights pursuant to this article by a residential occupant qualified for protection pursuant to this article made prior to the effective date of the act which added this article[1] shall be accorded any force or effect; however, subsequent to the effective date an owner and a residential occupant may agree to the purchase by the owner of such person's rights in a unit.

13. The applicability of the emergency tenant protection act of nineteen seventy-four[2] to buildings occupied by residential tenants qualified for protection pursuant to this article shall be subject to a declaration of emergency by the local legislative body. In the event such act expires prior to the expiration of this article[3], tenants in interim multiple dwellings shall be included in coverage of the rent stabilization law of nineteen hundred sixty-nine of the city of New York[5].

§ 287. Alternative compliance

In any case in which a local building code or this chapter provides an alternative means of meeting the fire and safety standards of article seven-B of this chapter, an owner of an interim multiple dwelling may, to the extent permitted by such local code or this chapter, elect to comply with the standards of such code or this chapter rather than with article seven-B. Such an election shall not affect an owner's obligations to meet the deadlines for compliance set forth in this article, and in such cases references herein to article seven-B shall be deemed to include any such local building code or the applicable provisions of this chapter.

* * *

MULTIPLE DWELLING LAW

§ 301. Certificate of compliance or occupancy

1. No multiple dwelling shall be occupied in whole or in part until the issuance of a certificate by the department that said dwelling conforms in all respects to the requirements of this chapter, to the building code and rules and to all other applicable law, . . .

* * *

2. Except as above provided, no dwelling constructed as or altered or converted into a multiple dwelling after April eighteenth, nineteen hundred twenty-nine, shall be occupied in whole or in part until the issuance of a certificate of compliance or occupancy.

* * *

§ 302. Unlawful occupation

1. a. If any dwelling or structure be occupied in whole or in part for human habitation in violation of section three hundred one, during such unlawful occupation any bond or note secured by a mortgage upon said dwelling or structure, or the lot upon which it stands, may be declared due at the option of the mortgagee.

b. No rent shall be recovered by the owner of such premises for said period, and no action or special proceeding shall be maintained therefor, or for possession of said premises for non-payment of such rent.

c. During such period the department in charge of water supply shall not permit water to be furnished in any such dwelling or structure and said premises shall be deemed unfit for human habitation, and the department of health or the department charged with the enforcement of this chapter shall cause them to be vacated.

* * *

§ 304. Penalties for violations

1. Except as otherwise in this section specifically provided, every person who shall violate or assist in the violation of any provision of this chapter shall be guilty of a misdemeanor punishable, for a first offense, by a fine of not exceeding five hundred dollars or by imprisonment for a period

of not exceeding thirty days, or by both such fine and imprisonment; for the second and any subsequent offense arising from the failure to remove the violation upon which the first offense was based, by a fine of not exceeding one thousand dollars or by imprisonment for a period of not exceeding six months, or by both such fine and imprisonment.

* * *

§ 306. Judicial procedure and orders

1. In case any multiple dwelling or structure or any part thereof or the lot on which it is situated is constructed, altered, converted or maintained in violation of any provision of this chapter or of any order or notice of the department, or in case a nuisance exists in any such dwelling or structure or part thereof or upon the lot on which it is situated, the department may institute any appropriate action or proceeding to prevent such unlawful construction, alteration, conversion or maintenance, to restrain, correct or abate such violation or nuisance, to prevent the occupation of said dwelling or structure or any part thereof, or to prevent any illegal act, conduct or business in or about such dwelling, structure or lot.

2. In any such action or proceeding the department may, by affidavit setting forth the facts, apply to the supreme court, or to any justice thereof, or, if the premises in respect to which the action is brought are situated in the city of New York, to the New York city civil court, for:

a. An order granting the relief for which said action or proceeding is brought, or enjoining all persons from doing or permitting to be done any work in or about such dwelling, structure or lot or any part thereof, or from occupying or using the same for any purpose, until the entry of final judgment or order.

b. An order authorizing the department to execute and carry out the provisions of any notice or order which is issued

by the department and not complied with, to remove any violation specified in such notice or order, or to abate any nuisance in or about such dwelling, structure or lot.

* * *

§ 309. Repairs, vacation and demolition of buildings.

1. a. The term "nuisance" shall be held to embrace public nuisance as known at common law or in equity jurisprudence. Whatever is dangerous to human life or detrimental to health, and whatever dwelling is overcrowded with occupants or is not provided with adequate ingress and egress or is not sufficiently supported, ventilated, sewered, drained, cleaned, or lighted in reference to its intended or actual use, and whatever renders the air or human food or drink unwholesome, are also severally, in contemplation of this law, nuisances. All such nuisances are unlawful.

b. Whenever the department shall certify that any multiple dwelling, or any part of its premises, or the plumbing, sewerage, drainage, lighting or ventilation thereof, is in a condition or in effect dangerous to life or health, the department may, after giving notice to the owner and an opportunity to be heard at a hearing held for such purpose declare the same, to the extent it may specify, a public nuisance. . . .

* * *

c. The department may order or cause such nuisance to be removed, abated, suspended, purified, altered, repaired or otherwise improved as the order shall specify.

d. The department may order or cause any multiple dwelling or any part of its premises, or any excavation, structure, sewer, plumbing, pipe, passage, matter or thing in or about such premises to be purified, cleansed, disinfected, removed, altered, repaired or improved.

LOFT BOARD

PURSUANT TO
SECTION 1105 OF THE
NEW YORK CITY CHARTER, Article 7-C of the Multiple Dwelling Law, and Mayor's Executive Order No. 66, The New York City Loft Board hereby promulgates the following Rules and Regulations Relating to Processing of Hardship Applications pursuant to Section 285(2) and the Charging and Collection of Fees pursuant to Section 282 of the Multiple Dwelling Law.

I. *Procedures*

A. *Who May File*

1. The owner of an interim multiple dwelling registered with the Loft Board may file an application for exemption of a building or portion thereof from Article 7-C of the Multiple Dwelling Law on the basis that compliance in obtaining a residential certificate of occupancy would cause hardship for any of the reasons set forth in Section II below.

2. A lessee of a whole building, any portion of which is an interim multiple dwelling registered with the Loft Board, may file an application for exemption from Article 7-C, provided that no application filed by a lessee shall be considered by the Loft Board unless the owner of the building consents in writing to the filing of such application.

3. A duly authorized agent (including the attorney) of the owner of an interim multiple dwelling registered with the Loft Board may file an application for exemption on behalf of the owner.

B. *Filing Deadline*

1. Notices of application for exemption due to hardship for a building or portion thereof must be submitted to the Loft Board by no later than June 30, 1983 pursuant to Section 285(2) of the Multiple Dwelling Law. Such notices shall be filed by letter from the owner, lessee of the whole building or agent and shall only be accepted for buildings registered or which by June 30, 1983 had applied to register as interim multiple dwellings with the Loft Board.

2. The applicant must perfect his/her/its application by no later than October 31, 1983.

C. *Perfecting Hardship Applications*

1. An application shall only be accepted for a building with a current interim multiple dwelling registration.

2. The application shall be in a form acceptable to the Loft Board and shall be consistent with the requirements of these regulations, the Board's regulations relating to applications to the Board (Regulations for Internal Procedures - Section VI, paragraphs 16-25), and to fees (Section 4.B.2.). The applicant must provide all information necessary or appropriate by no later than October 31, 1983 in order for the application to be considered. An additional time period of no more than sixty days for the submission of all required documentation in support of the completed application may be requested and will be granted if good cause is shown. The applicant must indicate the basis for the application, the residential units for which exemption is being applied for, and the specific claims for exemption being made. In addition, supporting data must be provided with the application whenever necessary or appropriate to fully set forth to explain the basis for the application.

3. In processing the application, the Loft Board may demand such additional information as it deems necessary or appropriate in making a determination. Failure of the applicant to provide any such information required by the Loft Board may result in the denial of the application.

4. Applications for exemption shall not be considered unless the owner has also filed an alteration application with the Department of Buildings. A copy of such alteration application must accompany each hardship application including two copies of the submitted plans and such additional copies of the plans as the Board may require. The Loft Board may vote to waive the requirement that an alteration application be filed and proceed with the consideration of the application for exemption. The approval of such a waiver shall apply only to the consideration of a hardship application and shall in no way affect the owner's obligation to file an alteration application for all other purposes as required by Section 284 of the Multiple Dwelling Law.

a. In deciding whether to waive the requirements that an alteration application be filed, the Board will consider the following criteria: (i) whether the information that would be contained in the alteration application is already available in other records or could be made available in an alternate form acceptable to the Board; and (ii) whether hardship can be proved without the information contained in the alteration application.

5. Processing of an owner's application for exemptions shall be in accordance with the rules regarding application to the Board (Regulations for Internal Board Procedures - Section VI, paragraphs 16-25), except as set forth below. These rules provide for the service of the application on all affected parties, opportunity to answer in writing, and the conducting of informal conferences and administrative hearings.

If a perfected application appears to the staff to be well founded, there shall be conducted an administrative hearing following notice as provided pursuant to Internal Board Procedures at least sixty days in advance of the hearing date.

II. *Processing of Application for Exemption Due to Hardship*

A. *Basis for Application*

The basis for applying for an exemption due to hardship is that compliance with Article 7-C of the Multiple Dwelling Law in obtaining a legal residential certificate of occupancy would cause cause hardship for one of the following two reasons.

1. *Adverse Impact* - Compliance would cause an unreasonably adverse impact on a non-residential conforming use occupant existing on June 21, 1982 within the building.

2. Infeasible Costs - The cost of compliance would render legal residential conversion financially infeasible.

B. *Appropriate Tests*

1. *Adverse Impact* - The test for unreasonably adverse impact on a non-residential conforming use occupant existing on June 21, 1982 shall be whether legal residential conversion would necessitate displacement of such occupant. An owner making a claim on this basis will be required to produce as part of the application, evidence to substantiate the claim. Displacement of non-residential conforming use occupants, may include instances where: (i) all or a critical portion, adversely affecting the conduct of business, of the space of an existing non-residential conforming use occupant would be lost as a result of the residential conversion; (ii) the nature of an existing non-residential conforming use would

render legal residential conversion to be infeasible or illegal by causing an imminent peril to the health and safety of residential occupants; (iii) the result of the legal residential conversion would be unreasonably disruptive to the business of the non-residential conforming use; or (iv) the inability of an owner who purchased the building before June 21, 1982 to expand his/her/its business which is an existing non-residential conforming use due to legal residential conversion would result in the elimination of existing jobs.

2. *Infeasible Costs* - The test for cost infeasibility shall be that the owner would be unable to attain a reasonable return on his/her/its investment; not maximum return on investment.

(a) Reasonable rate of return on the owner's investment shall be defined as a net annual return of five percent or more where net annual return is the percentage amount by which the annual gross earned income from the building exceeds the annual operating expenses of the building.

(b) Earned income shall mean the maximum annual collectible rent for the building, including any and all escalators, for both residential and non-residential units, plus miscellaneous income from all other sources in the building including vending machines, and sign rentals. The Loft Board shall impute a rental value for vacant units or units occupied either residentially or non-residentially by the landlord, any member of the landlord's family or an employee of the landlord, at the fair market value for the space, or if subject to Article 7-C at the maximum legal rent.

(c) Operating expenses shall consist of the actual, reasonable cost of: fuel, labor, utilities, taxes other than income or corporate franchise taxes, fees, permits, necessary contracted services and non-capital repairs, insurance, parts and supplies, management fees and other administrative costs

and interest on a bona fide mortgage. Criteria to be considered in determining a bona fide mortgage other than an institutional mortgage shall include: condition of the property, location of the property, the existing mortgage market at the time the mortgage is placed, the term of the mortgage, security and other terms and conditions of the mortgage.

(d) No application shall be approved unless the owner's equity in such building exceeds five percent of: (i) the arms length purchase price of the property; (ii) the cost of any capital improvement for which the owner has not collected or will not collect a surcharge; (iii) any repayment of principal of any mortgage or loan used to finance the purchase of the property or, any capital improvement for which the owner has not collected or will not collect a surcharge; and (iv) any increase in the equalized assessed value of the property after purchase by the owner. For the purposes of this paragraph, owner's equity shall mean the sum of (i) the purchase price of the property less the principal of any mortgage or loan used to finance the purchase of the property, (ii) the cost of any capital improvement for which the owner has not collected or will not collect a surcharge less the principal of any mortgage or loan used to finance said improvement, (iii) any repayment of the principal of any mortgage or loan used to finance the purchase of the property or any capital improvement for which the owner has not collected or will not collect a surcharge, and (iv) any increase in the equalized assessed value of the property which occurred subsequent to the first valuation of the property after purchase by the owner.

An owner making a claim on this basis will be required to produce, as part of the application, evidence, subject to audit, based on a representative consecutive 12 month period beginning no earlier than January 1, 1982, of the current net annual return for the building and the projected net annual return following legalization including, but not limited

to, current and projected earned income, operating expenses and equity information.

Inability to make a reasonable return on investment may include situations where the necessary and reasonable costs of compliance will cause residential units to rent at above prevailing market levels.

C. *Processing Guidelines*

1. Applications for exemption due to hardship will not be granted if the result of self-created hardship.

2. Applications for exemption due to hardship will not be granted if compliance can be reasonably achieved through:

(i) alteration of units,

(ii) relocation of tenants (residential or non-residential conforming use) to vacate space within the building,

(iii) re-design of space, or

(iv) application for a non-use related variance, special permit, minor modification or administrative certification.

Owners filing hardship application shall be required to make a reasonable attempt to cooperate with the tenants to achieve compliance through the methods listed above.

3. In considering such application, the Loft Board shall require the owner and tenants to consider constructive suggestions for alternatives to the proposed legalization plan, which would allow for a minimum vacating of residential occupancy, without adversely affecting existing non-residential conforming uses.

III. *Granting of Applications*

A. In resolving applications for exemption due to hardship, the Loft Board shall grant only the minimum relief necessary to relieve any hardship.

B. If the Loft Board approves an application for exemption due to hardship, the building or portion thereof for which the application is approved shall be exempt from Article 7-C of the Multiple Dwelling Law and may be converted to non-residential uses which must be in conformance with the zoning resolution and compatible with existing residential use. As a condition of approval of such application, the owner shall file with the Loft Board a certified copy of an irrevocable recorded covenant in form satisfactory to the Loft Board enforceable by the City of New York for fifteen (15) years from the date of the recording, that the building or portion thereof for which the hardship exemption has been granted will not be re-converted to residential uses during that time.

When the Loft Board approves such an application, the owner will be notified of the Board's intent to approve the application and will be afforded an opportunity of no more than 90 days to file the required covenant. The Loft Board will issue its final order approving the application following receipt of the certified copy of the covenant. If proof of the filing of the required covenant is not filed with the Loft Board within 90 days, the application will be denied and the owner will be required to comply with Article 7-C of the Multiple Dwelling Law.

C. If the hardship exemption is granted for a portion of the building, the IMD status for such building and the remaining residential units, covered under Article 7-C of the Multiple Dwelling Law in such building, shall not be affected, even if there are less than three qualified units remaining.

D. In approving an exemption application due to hardship, the Loft Board may fix reasonable terms and conditions regarding the owner's payment to the residential occupant of any reasonable moving costs and the fair market value of any improvements made or purchased by the residential occupant; and a reasonable time period for relocation, not to exceed one year.

Amendment to the Fee Regulation

Section 4. Fees

B. 2. *Hardship Applications* - the filing fee for an exemption application due to hardship shall be $1,000 for each building or portion thereof for which the application is filed. The fee must be paid by no later than October 31, 1983, the deadline for perfection of hardship applications.

Explanation

These regulations will establish procedures and criteria for processing hardship applications made to the Loft Board pursuant to Section 285(2) and will establish a filing fee for hardship applications pursuant to Section 282 of Article 7-C of the Multiple Dwelling Law.

I do hereby certify that good cause exists for waiving the requirement that thirty days shall first elapse after publication in THE CITY RECORD and that the foregoing Regulations shall become effective on the date of publication.

Dated: August 19, 1983

Filed with the City Clerk: August 26, 1983

s/s Carl B. Weisbrod
CARL B. WEISBORD
CHAIRMAN

H-1

STANDARD FORM OF LOFT LEASE
The Real Estate Board of New York, Inc.

Agreement of Lease made as of this 27th day of May 1982, between 640 BROADWAY RENAISSANCE CO. party of the first part, hereinafter referred to as LANDLORD, and PHOEBE RENTSCHLER and TEMPLE SMITH party of the second part, hereinafter referred to as TENANT

Witnesseth: Landlord hereby leases to Tenant and Tenant hereby hires from Landlord Loft Unit 9E in the building known as 640 Broadway in the Borough of Manhattan, City of New York, for the term of TWO (2) YEARS (or until such term shall sooner cease and expire as hereinafter provided) to commence on FIRST day of June nineteen hundred and Eighty-Two, and to end on THIRTY-FIRST day of May nineteen hundred and Eighty-Four both dates inclusive, at an annual rate of TWELVE THOUSAND DOLLARS ($12,000.00), payable in equal monthly installments of $1,000.00 on the first of each and every month without demand,

* * *

The parties hereto, for themselves, their heirs, distributees, executors, administrators, legal representatives, successors and assigns, hereby covenant as follows:

Rent

1. Tenant shall pay the rent as above and as hereinafter provided.

Occupancy

2. Tenant shall use and occupy premises for PHOTOGRAPHY STUDIO and for no other purpose.

Alterations:

3. Tenant shall make no changes in or to the demised premises of any nature without Landlord's prior written consent. Subject to the prior written consent of Landlord, and to the provisions of this article, Tenant at Tenant's expense may make alterations, installations, additions or improvements which are non-structural and which do not affect utility services or plumbing and electrical lines, in or to the interior of the demised premise. by using contractors or mechanics first approved by the Landlord.

* * *

Repairs:

4. Tenant shall, throughout the term of the lease, take good care of the demised premises and the fixtures and appurtenances therein and at Tenant's sole cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition, reasonable wear and tear, obsolescence and damage from the elements fire or other casualty, excepted. Notwithstanding the foregoing, all damages or injury to the demised premises or to any other part of the business, or to its fixtures equipment and appurtenances, whether requiring structural or non-structural repairs, caused by or resulting from carelessness, omission, neglect or improper conduct of Tenant, Tenant's servants, employees, invitees or licensees, shall be repaired promptly by Tenant at its sole cost and expense, to the satisfaction of Landlord reasonably exercised.

* * *

Requirements of Law, Fire Insurance, Floor Loads:

6. Prior to the commencement of the lease term, if Tenant is then in possession, and at all times thereafter, Tenant at Tenant's sole cost and expense, shall promptly comply with all present and future laws, orders and regulations of all state, federal, municipal and local governments, departments, commissions and boards and any direction of any public officer pursuant to law and all orders, rules and regulations of the New York Board of Fire Underwriters or any similar body which shall impose any violation, order or duty upon Landlord or Tenant with respect to the demised premises whether or not arising out of Tenant's use or manner of use thereof, or with respect to the building if arising out of Tenant's use or manner of use of the premises or the building (including the use permitted under the lease). Except as provided in Article 29 hereof, nothing herein shall require Tenant to make structural repairs or alterations unless Tenant has by its manner of use of the demised premises or method of operation therein, violated any such laws, ordinances, orders, rules, regulations or requirements with respect thereto.

* * *

Occupancy:

15. Tenant will not at any time use or occupy the demised premises in violation of the certificate of occupancy issued for the building of which the demised premises are a part. Tenant has inspected the premises and accepted them as is, subject to the riders annexed hereto with respect to Landlord's work, if any. In any event, Landlord makes no representation as to the condition of the premises and Tenant agrees to accept the same subject to violations whether or not of record.

* * *

Sprinklers:

29. Anything elsewhere in this lease to the contrary notwithstanding, if the New York Board of Fire Underwriters or the New York Fire Insurance Exchange or any bureau, department or official of the state or city government require or recommend the installation of a sprinkler system or that any change, modifications, alterations, or additional sprinkler heads or other equipment be made or supplied in an existing sprinkler system by reason of Tenant's business or the location of partitions, trade fixtures, or other contents of the demised premises, or for any other reason, or if any such sprinkler system installations, changes, modifications, alterations, additional sprinkler heads or other such equipment, become necessary to prevent the imposition of a penalty or charge against the full allowance for a sprinkler system in the fire insurance rate set by any said Exchange or by any fire insurance company, Tenant shall, at Tenant's expense promptly make such sprinkler system installations, changes, modifications, alterations, and supply additional sprinkler heads or other equipment as required whether the work involved shall be structural or non-structural in nature.

* * *

Glass:

36. Tenant shall replace, at the expense of Tenant, any and all plate and other glass damaged or broken . . . w

* * *

SEE RIDERS ANNEXED HERETO AND MADE PART HEREOF.

In Witness Whereof, Landlord and Tenant have respectively signed and sealed this lease as of the day and year first above written.

640 BROADWAY RENAISSANCE CO.

Witness for Landlord: By:.....

..... /s/.....
PHOEBE RENTSCHLER

Witness for Tenant: /s/.....
TEMPLE SMITH

..... /s/.....

* * *

ADDITIONAL CLAUSES attached to and forming a part of Lease dated May 27, 1982 between 640 BROADWAY RENAISSANCE CO. as Landlord and PHOEBE RENTSCHLER and TEMPLE SMITH as Tenant.

39. *PERMITS:* Tenant covenants that Tenant will not use or suffer or permit any person to use the demised premises for any unlawful purpose and to obtain and maintain at Tenant's sole cost and expense all licenses and permits from any and all governmental authorities having jurisdiction of the demised premises which may be necessary for the conduct of Tenant's business therein. Tenant further covenants to comply with applicable laws, resolutions, codes, rules and regulations of any department, bureau, agency or any governmental authority having jurisdiction over the operation, occupancy, maintenance and use of the demised premises for the purposes set forth herein. Tenant will indemnify and save Landlord harmless from and against any claims, penalties, loss, damage or expense imposed by reason of a violation of any applicable law or the rules and regulations of governmental authorities

having jurisdiction thereof related to Tenant's use and occupancy.

40. *INDEMNITY:* Tenant agrees to indemnify and save harmless landlord against and from any and all claims by or on behalf of any person or persons, firm or firms, corporation or corporations, arising from any work or thing whatsoever done by or on behalf of Tenant, in or about the demised premises, and will further indemnify and save Landlord harmless against and from any and all claims arising from any breach or default on the part of Tenant in the performance of any covenant or agreement on the part of tenant to be performed, pursuant to the terms of this lease, or arising from any act or negligence of Tenant, or any of its agents, contractors, servants, employees or licensees, and from and against all costs, reasonable counsel fees, expenses and liabilities incurred in or about any such claims or action or proceeding brought thereon; and in case any action or proceeding be brought against Landlord by reason of any such claim, Tenant, upon notice from Landlord, covenants to resist or defend, at Tenant's expense, such action or proceeding by counsel reasonably satisfactory to Landlord.

* * *

54. COST OF LIVING ADJUSTMENT: Recognizing the length of the term of the lease granted Tenant and inflationary tendencies in recent years, Tenant agrees that in the event the "Consumer Price Index" published by the Bureau of Labor Statistics of the U.S. Department of Labor (1967 = 100) for New York/Northeastern New Jersey area fir :All items" (hereinafter called the "Price Index"), or successor or substitute index appropriately adjusted, reflects an increase after the commencement date of this lease in the cost of living, over and above such costs as reflected by such Price Index as it exists for the month of May 1982 (hereinafter called the "Base

Month") the fixed rent payable hereunder shall be increased in accordance with the following:

(a) There shall be no adjustment until the month of June 1983 On the first day of June 1983 and each June 1 thereafter through the term, there shall be an adjustment in the amount of said fixed rent based on the difference between the Price Index as it exists on the Base Month and the Price Index for the calendar month of the date of such adjustment.

(b) The percentage increase thus determined shall be multiplied by annual fixed rent payable hereunder and this sum shall represent the annual increase in such rent for the twelve (12) months next ensuing, commencing with such June adjustment month, provided that no such adjustment shall result in a decrease in the fixed rent below the fixed rent payable by Tenant under the terms of this lease.

* * *

55. *Maintenance.* Tenant shall maintain the premises in a proper manner and in a general state of cleanliness. Tenant shall, at Tenant's sole cost and expense, arrange for the removal of and shall cause to be removed all refuse and rubbish from the demised premises in a manner which shall at all times comply with (a) such rules and regulations as, in the judgment of the Landlord, are necessary or desirable for the proper operation of the Building and (b) all applicable laws, orders, ordinances, rules and regulations of the Sanitation Department and Board of Health of New York City and of any other governmental authority having jurisdiction over the demised premises or the operations conducted therein.

56. *No Representations.* Tenant acknowledges that Tenant is fully familiar with the condition of the Building and the demised premises. Tenant therefore agrees to accept the demised premises "as is" and in whatever state or condition they may be in at the commencement of the term of this lease.

Landlord shall not be obligated to do any work or may any repairs, alterations, or improvements in or to the demised premises, except as specifically set forth in this lease.

* * *

58. *Certificate of Occupancy:* Tenant acknowledges that the certificate of occupancy, if any, for the building does not permit residential occupancy of the premises.

* * *

62. Tenant shall supply and install all fixtures desired by Tenant at Tenant's own cost and expense. Tenant also recognizes and agrees that the Tenant must obtain the written consent of the landlord for all alteration work to be done on the premises *in advance* for all such work being done. Tenant further recognizes and agrees that because this is a fireproof building, that all partition work must be done with metal studs and with 5/8" sheet rock on both sides. Tenant further recognizes, understands and covenants that the use of any wooden studs or partitions in the premises will be both a violation of the lease and a violation of the applicable building laws and codes and tenant covenants and agrees not to use any non-fireproof materials in any such construction work.

63. Tenant also recognizes and understands that all plumbing work must be done or approved by a licensed plumber and will submit all plumbing plans to the landlord for landlord's prior written approval before such work is commenced.

64. Tenant recognizes, agrees and covenants that all waste and vent lines must be made of properly sized cast iron or galvanized iron pipe and that the use of plastic pipe is not legal in New York City. Tenant further recognizes and agrees that if copper tubing is used, said copper tubing must be *rigid*

copper tubing and that the use of flexible copper tubing is not lawful or permitted and will also be a violation of the lease.

65. Tenant recognizes, agrees and covenants that all electrical work must be done and filed by a New York City licensed electrician. Tenant shall supply copies of all electrical installation drawings to the Landlord prior to such installation.

66. Tenant shall require all its contractors, plumbers and electricians to supply to the Landlord a certificate of insurance naming the Landlord as an additional insured prior to the commencement of any work by said contractor, plumber or electrician.

* * *

69. Tenant warrants and represents that Tenant has fully inspected premises and, in particular, the present gas and electric services in the premises; Tenant accepts the premises and the existing gas and electric services as is and represents and warrants to the landlord that all necessary work to the electric and gas systems in the loft premises, if any, shall be done by Tenant, at Tenant's sole cost and expense, and in compliance with all applicable New York City codes, laws and regulations. All necessary installation of any meters for gas or electric service, or additional gas or electric lines, if any, will be at Tenant's sole cost and expense.

* * *

72. Tenants agree to accept the demise premises "as-is" in its condition as of the date hereof.

Please Initial:

Landlord _____

Tenant _____

* * *

GUARANTY

The undersigned Guarantor guarantees to Landlord, Landlord's successors and assigns, the full performance and observance of all the agreements to be performed and observed by Tenant in the attached Lease, including the "Rules and Regulations" as therein provided, without requiring any notice to Guarantor of nonpayment or, nonperformance, or proof, or notice of demand, to hold the undersigned responsible under this guaranty, all of which the undersigned hereby expressly waives and expressly agrees that the legality of this agreement and the agreements of the Guarantor under this agreement shall not be ended, or changed by reason of the claims by Landlord against Tenant of any of the rights or remedies given to Landlord as agreed in the attached Lease. The Guarantor further agrees that this guaranty shall remain and continue in full force and effect as to any renewal, change or extension of the Lease. As a further inducement to Landlord to make the lease, Landlord and Guarantor agree that in any action or proceeding brought by either Landlord or the Guarantor against the other on any matters concerning the Lease or of this guaranty that Landlord and the undersigned shall and do waive trial by jury.

Dated, New York City 5/27 1982

WITNESS:

s/s.....Guarantor
Phoebe Retschler

/s/_____
Temple Smith

UNITED STATES BANKRUPTCY COURT

Southern District of New York

In re

640 BROADWAY RENAISSANCE COMPANY

Case No. 90B10574 TLB

Debtor(s)*
Social Security No.:
Employer Tax ID No.:

CERTIFICATE OF COMMENCEMENT OF CASE

I certify that on 2/22/90

XX the above named debtor filed a petition requesting relief under chapter 11 of the Bankruptcy Code (title 11 of the United States Code), or

__ a petition was filed against the above named debtor under chapter __ of the Bankruptcy Code (title 11 of the United States Code), and

__ that as of the date below the case has not been dismissed.

CECELIA M. LEWIS
Clerk of Court

By: /s/_____
Deputy Clerk

FEB 22 1990
Date

---

* Set forth all names, including trade names, used by the debtor within the last 6 years. (Bankruptcy Rule 1005). For joint debtors set forth both social security numbers.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

640 BROADWAY RENAISSANCE COMPANY, a New York Partnership,	:	Docket Number
	:	88 Civ. 6288 (JMW)
Plaintiff,	:	
	:	**NOTICE OF**
- against-	:	**MOTION**
	:	Oral Argument
MARIO CUOMO, as Governor of The State of New York, *et al.*,	:	Requested
	:	
Defendants.	:	

----------x

PLEASE TAKE NOTICE, that upon the annexed Statement of Material Facts [Local Rule 3(g)], upon the affidavit of Martin R. Fine sworn to the 28th day of June, 1989, upon the exhibits annexed thereto, upon the accompanying memorandum of law, and upon all of the proceedings heretofore had herein, the undersigned will move this Court before the Honorable John M. Walker, Jr. in the United States Courthouse, Foley Square, New York, on July 17, 1989, or as soon thereafter as counsel can be heard, for an Order pursuant to Rule 56 of the Federal Rules of Civil Procedure:

a. Declaring that Article 7-C of the New York Multiple Dwelling Law and related laws are unconstitutional as applied to the plaintiff;

b. Declaring that Article 7-C of the New York Multiple Dwelling Law is unconstitutional on its face;

c. Permanently enjoining the governmental defendants from enforcing the provisions of Article 7-C of the New York

Multiple Dwelling Law and related laws against the plaintiff in the case of the building located at 640 Broadway, New York, New York;

d. Permanently enjoining the governmental defendants from preventing the plaintiff from curing the existing "use" violations at the building located at 640 Broadway, New York, New York by ending all residential use therein;

e. Permanently enjoining the governmental defendants from preventing the plaintiff from using the building for whatever legal use is presently permitted by the New York City Zoning Resolution and the existing certificate of occupancy for the building;

f. Declaring that the fixtures and improvements made by the occupants are the property of the plaintiff;

g. Setting the matter down for a hearing to determine the plaintiff's damages as demanded in Count Two of the complaint;

h. Setting the matter down for a hearing to determine the plaintiff's damages as demanded in Count Five of the complaint;

i. For such other and further relief as may be just under the circumstances.

Dated: New York, New York
June 29, 1989

Yours, etc.,

FISCHBEIN-BADILLO
Attorneys for Plaintiff

By:/s/_____
Kenneth G. Schwarz
A member of the firm

909 Third Avenue
New York, New York 10022
(2120 826-2000

TO: ROBERT ABRAMS, ESQ.
Attorney for Defendant Cuomo
120 Broadway, 24th Floor
New York, New York 10271
(212) 341-2000
Att: Dennis J. Saffran, Esq.

PETER L. ZIMROTH, ESQ.
Attorney for Municipal Defendants
100 Church Street, Room 5J16
New York, New York 10007
(212) 566-4432
Att: Albert Fredericks, Esq.

CATHERINE McALEVEY, ESQ.
Counsel to the New York City Loft Board
116 Nassau Street, 11th Floor
New York, New York 10038
(212) 566-1438

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

640 BROADWAY RENAISSANCE COMPANY, a New York Partnership,	:	Docket Number
	:	88 Civ. 6288 (JMW)
Plaintiff,	:	
	:	**RULE 3(g)**
- against-	:	**STATEMENT**
	:	
MARIO CUOMO, as Governor of The State of New York, *et al.*,	:	
	:	
Defendants.	:	

Plaintiff, by its attorneys, Fischbein-Badillo, submits, pursuant to Rule 3(g) of this Court's Civil Rules, the following statement of material facts as to which it contends there is no genuine issue to be tried.

1. Plaintiff is the owner of building known as and located at 640 Broadway, New York, New York.

2. That at the time plaintiff acquired the building, and continuing until today, the building is located in an M1-5B Zone, which is defined as a light manufacturing district. Accordingly, the Zoning Resolution of the City of New York applicable to the area in which 640 Broadway, New York, New York is located prohibits the use of this building for residential purposes.

3. That at all times relevant hereto the certificate of occupancy issued to the building permitted 640 Broadway, New York, New York, to be used for commercial, manufacturing and office purposes, but not for residential purposes.

4. That at the time each of the leases of the present occupants of 640 Broadway New York, New York were executed, the units which were being rented were, with one exception, vacant and each prospective tenant had a residence elsewhere. The one exception was Joel Hinman who specifically agreed to discontinue the use of his unit as a residence and limit his future use to bona fide commercial purposes.

5. That at all times relevant hereto it was and is illegal to use any portion of 640 Broadway, New York, New York for residential purposes.

6. That 640 Broadway, New York, New York, was constructed in 1895. It was not built to serve as a residence. It is not now structurally or architecturally suitable to serve as a multiple dwelling.

7. That in order to make 640 Broadway physically suitable for residential use, major structural changes would be required, including the installation of fireproof walls, stairways and fire escapes, as well as the installation of new elevators and substantially new plumbing, heating and electrical systems. In addition, the owner would have to comply with a myriad of City and State laws which only apply to residential, but not to commercial buildings.

8. That the exception of tenant-caused illegal subdivisions and other illegal tenant work, 640 Broadway, New York, New York is presently in compliance with all of the applicable provisions of the building code and the zoning resolution which govern its use for commercial, office and light manufacturing purposes.

9. That at no time did the plaintiff ever lease any portion of 640 Broadway for residential purposes. In the case of each lease that was made, the lease specifically provided that the premises were to be used for commercial, office or

manufacturing purposes and that, in no event, could the units be used as residences.

10. That during the years between 1978 and 1982, the plaintiff made the following 16 commercial leases, and no others: John Eisner (2E); Robert Rossiter (2W); Richard Yoder (3E); Charles Searles (3W); Carlos Sosa (4E); Andrea Vignoli (5E); Joel Hinman (5W); Hannah Eshel (6E); Lisa Krall (6W); Nancy Hoffman (7E); Ruth Holloman (7W); Donna Goodman (8W); Peter Neptune (8C); Phoebe Rentschler and Temple Smith (9E); and Marie-Paule Fauque (9W).

11. That while the plaintiff only leased seventeen (17) units other than the stores on the street level, the building now contains twenty (20) units covered by the Loft Law because of various subdivisions, sublets and assignments created by the occupants.

12. That in making the various leases with the occupants of 640 Broadway, New York, the premises were rented "as is" and plaintiff never agreed to furnish them with residential-type building services. Instead, the only services which the plaintiff ever agreed to furnish were those services which are normally found in commercial leases.

13. That in spite of the express representations contained in their leases that they not use the leased premises for residential purposes or for any other unlawful purpose, the occupants of 640 Broadway, New York, New York, knowingly and deliberately resided in their units in violation of the lease provisions, the building's certificate of occupancy, the New York Multiple Dwelling Law, and the applicable zoning laws.

14. That upon the expiration of their commercial leases, the occupants of 640 Broadway, New York, New York, failed and refused, in violation of those leases, to quit and surrender

possession of their units to the plaintiff based upon the authority and provisions of the Loft Law.

15. That on June 21, 1982, the New York State Legislature enacted Article 7-C of the Multiple Dwelling Law, which is commonly known as the Loft Law.

16. That on April 28, 1988, the Loft Board, an administrative agency established by the Loft Law, determined that 640 Broadway, New York, New York was covered by the Loft Law and declared it to be an "interim multiple dwelling."

17. That prior to April 28, 1988, the hardship exemption provisions which had been contained in the Loft Law had already expired.

18. That since the determination of the Loft Board that 640 Broadway, New York, New York, is covered by the Loft Law, and is an "interim multiple dwelling", none of the occupants of the building have paid rent and/or use and occupancy to the plaintiff. However, they have continued to use and occupy their units for both business and residential purposes.

19. That at the present time plaintiff is owned rent, additional rent and/or use and occupancy in the amount of at least $465,017.94 calculated at the monthly rental rates set forth in the expired leases.

20. That in order for the plaintiff to comply with the requirements of the Loft Law it will have to expend upwards of Two Million ($2,000,000.00) Dollars.

21. That compliance with the Loft Law will cause a devastating economic hardship to the plaintiff.

Dated: New York, New York
June 29, 1989

Yours, etc.,

FISCHBEIN-BADILLO
Attorneys for Plaintiff
909 Third Avenue
New York, New York 10022
(212) 826-2000

By: /s/ _____
Kenneth G. Schwarz
A member of the firm

3RD STORY of Level 1 printed in FULL format.

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June 12, 1988, Sunday, Late City Final Edition

SECTION: Section 10; Page 11, Column 1; Real Estate Desk

LENGTH: 1424 Words

HEADLINE: IF YOU'RE THINKING OF LIVING IN:. SoHo

BYLINE: By MARK McCAIN

BODY:

THAT chic and gritty district of Manhattan known as SoHo should post a warning at its borders: Only rich artists need apply. For what was once a refuge for painters seeking cheap space to work on huge canvases has been bid up like the prices of Warhol knickknacks at a Sotheby's auction.

Along narrow, cobblestoned streets, loft buildings from a century ago — when Manhattan boasted manufacturing muscle — now house sculptors, painters and people simply willing to pay the price.

Technically, only city-certified artists can move into SoHo, except for a few buildings open to anyone. The theory is that artists need large, inexpensive spaces to create their work. But frenzied demand for Manhattan housing is pushing that theory beyond its limits.

On Wooster Street, a 7,500-square-foot loft has been transformed into a fantasyland of more than a dozen rooms

dressed up with architectural artifacts like marble fireplaces. It's for sale at $2.3 million.

There are cheaper lofts, of course, but below $500,000 the options are limited and modest. The raw loft space, decrepit and dirty, that attracted artists to SoHo a decade ago is rarely for sale today. When a building at 123 Greene Street became a residential co-op recently, the unrenovated 4,000-square-foot floors sold briskly for about $800,000 apiece.

"Ten, 15 years ago when artists first came here, a lot of them were young and living together," said Anthony Dapolito, who has been watching the neighborhood from his bakery on Prince Street for half a century. "Now they all have babies and they're just like everyone else. They're interested in day-care centers and schools. They want playgrounds."

But no one left room for playgrounds in SoHo, which is zoned for manufacturing. So its metamorphosis from factory grime to family comforts is incomplete.

And that appeals to many of the residents, who enjoy the eclectic, often volatile mix of artistic and commercial forces in this 33-block district, named SoHo because it extends south of Houston Street to Canal Street. Even to tourists who crowd the streets on weekends, the incongruity is hard to miss.

Within a few yards of Fanelli Cafe, a friendly beer-and-burger joint at Prince and Mercer Streets, there are a lumber yard, an art gallery, a machine shop, a fashion boutique, and a store with more photography books than nearly any competitor in North America.

Most of SoHo lies within a historic district created in 1971 to protect "the largest concentration of cast-iron facades *anywhere* in the world." Greene Street is especially rich in ornate columns, entwined serpents, pilasters and arches.

Even before the Italianate cast-iron architecture began emerging in the late 1860's, SoHo had a commercial appeal. Warehouses and stables lined the streets — having pushed out the modest clapboard houses of blacksmiths and other workers who moved in after farmers sold off their acreage in the late 1700's.

Although the formal lines of historic SoHo are rigid, its neighborhood spirit is fluid, spreading north and west, while Chinatown edges up from the southeast. Its free-spirited disdain of boundaries helps make SoHo a creative, chaotic place. It would rather assault senses than assuage them.

That rebellious spirit carries over into regulatory matters. Unreliable freight elevators converted illegally to passenger use are common. So are dozens of other building-code violations. Some co-ops lack certificates of occupancy, which New York City requires of all residential structures. For a buyer, that means a deal must be all cash because banks will not finance illegal residences.

Since 1971, when a zoning resolution was adopted to allow living-working quarters in SoHo, new residents have been required to be certified as artists by the Department of Cultural Affairs.

But many people who would be hard pressed to draw a stick figure have moved into SoHo without certification. So last fall, in an admission of past enforcement failures and a vow of future vigilance, the city offered amnesty to SoHo residents who broke the rules.

Since then, co-op boards and real estate brokers have been reluctant to sidestep certification. The city has yet to display a hard-line stance, but people fear the city will initiate eviction proceedings against new residents who flout it.

"Like manufacturers, artists use their space to create their work, so we feel we're justified in making a special exception for them," said Susan B. Rothschild, counsel to the Department of Cultural Affairs. "It's the artists who are largely responsible for the excitement and vitality of SoHo today."

Above half of the 4,000 residential lofts in SoHo are rental, but they are difficult to find on the market. And for the people who live within them, they often are difficult to hang onto only because of their murky legal status.

"It's not the typical nature of artists to become involved with lawyers, bureaucracy and paperwork — but we've become pros at it," said Marie Dormuth, an artist who moved into a loft on Canal Street 11 years ago. "Nearly every artist I know has very expensive legal counsel."

Part of their legal time is focused on 1985 regulations the city Loft Board adopted to force renovations in nearly 1,000 residential loft buildings with health, safety or fire code violations. First, debate raged over how renovation costs should be shared; now tenant activists fear that hundreds will be evicted from buildings where owners cannot, or will not, remove violations by the 1992 deadline.

"It's a real distraction from our work, but we have to fight because this housing stock is a rare resource that belongs to the artists," Ms. Dormuth declared. "We pioneered this neighborhood, and we're still a strong group, even though now we've surrounded by gilded French restaurants and boutiques."

IT is those restaurants and boutiques — along with the art galleries — that define SoHo for many visitors. From Dean & DeLuca, a cornucopia of fresh and exotic foods, to Chanterelle, the only downtown restaurant to earn four stars from The New York Times restaurant critic, good food is never far way in SoHo.

Nor is provocative art. In addition to the roster of famous galleries operated by the likes of Max Protech, Diane Brown and Leo Castelli, new galleries seemingly germinate overnight.

Throughout SoHo, a core of establishments have prospered for more than a decade — while a dizzying parade of others pass through, often nipped by rising rents, especially along the prime retail street, West Broadway.

"It's like West Broadway gets a personality makeover at least once a year," said David Matthews, a dancer who lives on Greene Street. "Right now it's all fancy boutiques and cafes, although some kitschy galleries and T-shirt shops have opened up to tap the tourist market."

Yet as a community created within an old manufacturing district, SoHo lags behind in basics like supermarkets, barbershops and variety stores. Schools, too, tend to be outside the neighborhood.

Parents in SoHo can choose among more than a dozen private and parochial schools elsewhere in downtown Manhattan, and three public elementary schools: P.S. 3 at 490 Hudson Street, P.S. 41 at 116 West 11th Street and P.S. 234 at 334 Greenwich Street. The High School for Humanities, about 20 blocks north at 351 West 18th Street, is a frequent choice for older students.

"Like every other community we have lots of little problems," said Mr. Dapolito, the 67-year-old baker, "but SoHo has survived the years well — and so have I. When everyone was eating Wonder Bread and TipTop I thought it was the end of the world for bakeries. But these artists, they go wild for my bread.

"I don't think we could have gotten a better class of people than the artists," he added. "They're intelligent, they're hard working and they're nonviolent."

GAZETTEER

Population: 8,400 (1980 census).

Median household income: $36,400 (1985 estimate)

Median 2,000-square-foot loft price: $535,000.

Median 2,000-square-foot loft rent: $3,250.

Rush-hour commutation to midtown: 15 minutes on the IRT, BMT or IND line, 20 minutes by bus on the major avenues.

Councilwoman: Miriam Friedlander, Democrat.

Blazing Barrels: In the 1800's firefighters called SoHo "Hell's Hundred Acres" because of fires that broke out repeatedly in warehouses overcrowded with cloth, chemicals and other flammables — spurring owners to began erecting brick and cast-iron warehouses around 1870.

GRAPHIC: Photos of Chanterelle restaurant at 89 Grand Street; interior of Dean & DeLuca, exotic food store at 121 Prince Street (NYT/Peter Freed); map of SoHo (NYT)

SUBJECT: SOCIAL CONDITIONS AND TRENDS; GEOGRAPHIC PROFILES

NAME: MCCAIN, MARK

GEOGRAPHIC: NEW YORK CITY; SOHO AREA (SOUTH HOUSTON INDUSTRIAL DISTRICT) (NYC)

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SECTION: Section 8; Page 7, Column 1; Real Estate Desk

LENGTH: 1012 words

HEADLINE: City Drafts Formal Rules for Living in Artists' Lofts

BYLINE: By Michael deCourcy Hinds

BODY:

TO live in one of the 3,500 lofts in NoHo, residents must be artists and they are supposed to prove it to the Department of Cultural Affairs, which recently drafted regulations based on the informal procedure it has used since 1971.

"These are the first formal regulations we have proposed," said Susan B. Rothschild, counsel to the department. "They are basically a codification of existing procedures. Our goal was to encourage anybody in the fine arts to apply."

City and community surveys indicate that a third of the residents in the two sections are certified artists and that the majority of the remaining residents are qualified artists who have not applied for certification.

Most of the nonartist residents, with exceptions based on the length and location of their residence, are living in SoHo or NoHo illegally. The city has not enforced this zoning

provision, but many tenants seek certification to prevent landlords from using their illegal status as grounds for eviction.

SoHo is the area south of Houston Street to Canal Street and bounded by West Broadway on the west and Lafayette Street on the east. NoHo is the area north of Houston Street to Astor Place, from Broadway on the west to the Bowery and Mulberry Street on the east.

Artists and tenants generally welcome the issuance of regulations.

"It's high time for them to codify something," said Chuck DeLaney, a photographer and a tenant representative on the city's Loft Board, which regulates about 7,000 city lofts. "For 15 years, this has been part of the oral tradition. How to become a certified artist is like trying to find out how to get to heaven — you always had to take somebody's word for it."

Certification is required by the city's zoning resolution, which permits artists to live and work in SoHo and NoHo, manufacturing-zoned districts. The State Legislature made this arrangement possible in 1964, when it amended the Multiple Dwelling Law to permit joint living-working quarters for artists in commercial and industrial lofts in locally designated areas.

The state law defines an artist as "a person regularly engaged in the fine arts, such as painting and sculpture, or in the performing or creative arts, including choreography and filmmaking, or in the composition of music on a professional basis and so certified."

Commercial artists, such as illustrators or photographers, were not included, the theory being that they are better able to afford studios in other areas.

The department decided to issue the regulations in an effort to discourage nonartists from illegally moving into the

area — and to comply with a ruling in State Supreme Court that ordered the agency to write regulations. The ruling came in a case involving the department's refusal to certify a photographer. The court held that the case was impossible to review in the absence of written certification rules.

The certification procedure calls for artists to provide samples of their work, a resume of their training and exhibitions and professional references.

A major change in the proposed regulations would eliminate the requirement for artists to apply for certification every three years. Instead, artists would be given lifetime certification, which would be updated only when an artist moved from one loft to another. Newcomers must register under the new regulations when they take effect. It has not yet been determined whether the existing three-year certifications will be automatically extended to lifetime certification.

The new certification rules become effective in August after a comment period. They are not intended to be used as a tool to evict nonartists from SoHo or NoHo, but to discourage more nonartists from moving to the area, according to the department.

The city's Planning Commission is currently considering ways to resolve the status of nonartist residents. LAST Wednesday the City Council's Committee on Housing and Buildings held a hearing on Councilwoman Miriam Friedlander's resolution that the Planning Commission "waive the artist-certification requirement for residents who lived in the area prior to April 1, 1981, or who are otherwise eligible for coverage under the loft law." The loft law, for example, grandfathers the residential status of some nonartists who have lived in the area since 1976.

The Democratic Councilwoman, whose district is lower Manhattan, has also introduced a resolution urging the relevant

city agencies to give tenants living in illegal lofts — the commercial buildings used for residences — another chance to register them and be protected from eviction under zoning resolutions. As it stands now, about 200 illegal lofts were not registered before the 1983 deadline and the tenants are subject to eviction, according to the Loft Zoning Coalition, a tenant group. The Loft Board, meanwhile, continues to develop a large backlog of landlord-tenant cases because it was not been able to hold regular meetings for several months this year as a result of vancancies on the board and delays caused by an ethics ruling, according to William Bernstein, executive director of the board.

In April, Jorge Batista, the former board chairman and president of the South Bronx Development Organization, resigned as a result of the city's Board of Ethics ruling that board members are city officials and that their outside business activities were restricted by city laws. Mayor Koch then appointed George Dole as chairman.

2ND STORY of Level 1 printed in FULL format.

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October 21, 1986, Tuesday, Late City Final Edition

SECTION: Section B; Page 1, Column 3; Metropolitan Desk

LENGTH: 1013 words

HEADLINE: SUITABLE FOR FRAMING;
CITY MAKES IT OFFICIAL: THEY'RE ARTISTS

BYLINE: By GEORGIA DULLEA

BODY:

FIFTEEN years after the Museum of Modern Art acquired its first work by Benny Andrews, and four years after the National Endowment for the Arts named him director of its visual arts program, an advisory committee to the city's Department of Cultural Affairs sat in a conference room the other night pondering whether he was a professional artist. They concluded he was. The 55-year-old painter was relieved. Last month the panel, the Artist's Certification Committee, had postponed action on Mr. Andrews's application for official status as an artist because of a technicality. "I forgot to sign my name," he said, rolling his eyes. "We artists don't always think about dotting 'i's' and crossing 't's.' "

Breaking New Ground

When Mr. Andrews and 29 other men and women joined the ranks of the city's 5,000 certified artists last week, they were not only following in the steps of Willem de

Kooning, Red Grooms and Alex Katz, but also breaking new ground in the 15-year-old certification program. Theirs were the first applications to be approved under formal, written regulations rather than an informal process that has mystified a generation of professionals in the creative arts.

The chief reason so many artists submit themselves to the process is that certification entitles them to legally live and work in commercial or industrial zones like SoHo where spaces are large and filled with light and rents are — or once were — low.

A Seal and a Signature

Other artists say certification — in the form of a notarized certificate, suitable for framing, bearing the silver seal of the Cultural Affairs Department and the signature of Commissioner Bess Myerson — looks good on grant applications. It is also said to impress the Internal Revenue Service.

"Primarily our applications come from New York," said the program's coordinator, Joseph Giordano, "but we get them from other parts of the country and the world — Spain, Israel, France, Canada, Italy, India. If they meet our criteria, we certify them."

As he spoke the telephone rang in his office at 2 Columbus Circle. The caller, a multimedia artist, told Mr. Giordano he would not divulge his Social Security number on his application. "Why does Bess Myerson want my Social Security number?" he asked.

Mr. Giordano, a painter before becoming a bureaucrat, decided not to press the matter. "With artists," he said, "you've got to be careful about issues of personal freedom."

A Mystery, Even to Applicants

The Artist's Certification Committee has long been something of a mystery body, even to artists. Created in 1971, the 18 artists, art educators and administrators from various disciplines meet 10 times a year. Of the 600 applicants whose credentials are considered each year, 75 percent are said to receive certificates.

Until recently, however, no written rules on certification existed and the procedure has long been the subject of lore. Chuck DeLaney, a photographer and a tenant representative on the Loft Board, says stories are still told in SoHo of nonartists who submitted their children's fingerpaintings and were certified within a week.

A couple of weeks ago, Mr. Giordano visited several real-estate agencies in SoHo, posing as a prospective loft buyer. He said that at each space he was shown, he asked the agent, "Don't you need some kind of artist's certificate to live here?" Invariably, he said, the reply was "Don't worry about it" or "Do you know any artists?"

Rent-An-Artist

The question was an allusion to the "rent-an-artist" scheme, he said, in which nonartists rent out small corners of lofts to people in berets.

One reason the formal regulations were drafted was to discourage nonartists from moving into artists' districts. "The city is concerned that our fine artists have places to live and work, and SoHo was set aside for that purpose," Ms. Myerson said.

According to a lawyer for the department, Susan B. Rothschild, the regulations basically codify past procedure. One change makes the certificate valid as long as the artist remains at the same address. In the past, artists had to be recertified every three years.

Documentation Needed

An artist is defined as one "engaged in the fine arts, not the commercial arts, including but not necessarily limited to painting, sculpture, choreography, filmaking and the composition of music, regularly and on a professional basis."

Extensive documentation is required. A visual artist must submit 15 to 20 slides or photographs of recent work, in addition to a resume, review clippings, show catalogues and references.

"What we do," said Robert Blakely, a painter on the committee, "is review their materials — slides, tapes, films, anything that proves they're out there in the real world functioning as a real artists. When we're really confused, rather than turn them down, we'll make a studio visit, which usually clears things up."

When the artist lives in SoHo or NoHo, the process is more complex. These areas are designated artists' joint living-working districts.

A 'Discerning' Committee

"By law," Mr. Blakely said, "we're bound to take the space needed into consideration. Theoretically, an artist like Joseph Cornell, who makes little boxes, wouldn't need the same space as Rivera, the Mexican muralist."

Ms. Myerson, who has observed the committee at work, describes them as "very intense and arduous."

"I've watched these people poring over credentials of artists to prove that they are fine artists, not commercial artists," she said. "They examine slides, signatures on paintings and in some instances they've discovered fraudulent representation. They're discerning." Doris Diether, a dance

critic and former committee member, recalled the case of an applicant who photographed paintings on display and submitted the slides as samples of his own work.

"Someone on the committee laughed and said, 'Oh, come on. That's So-and-So's work," she said. "The supposed artist was very indignant when we turned him down."

GRAPHIC: Photo of Benny Andrews and wife Nene Humphrey (NYT/Dith Pran)

SUBJECT: ART; ZONING

ORGANIZATION: CULTURAL AFFAIRS, NEW YORK CITY DEPARTMENT OF

NAME: GIORDANO, JOSEPH; DULLEA, GEORGIA; ANDREWS, BENNY

GEOGRAPHIC: NEW YORK CITY; SOHO (NYC)

Chapter 1 Statement of Legislative Intent

41-00 GENERAL PURPOSES OF MANUFACTURING DISTRICTS

The Manufacturing Districts established in this resolution are designed to promote and protect public health, safety, and general welfare. These general goals include, among others, the following specific purposes:

(a) To provide sufficient space, in appropriate locations, to meet the needs of the City's expected future economy for all types of manufacturing and related activities, with due allowance for the need for a choice of sites.

(b) To provide, as far as possible, that such space will be available for use for manufacturing and related activities, and to protect residences by separating them from manufacturing activities and by prohibiting the use of such space for new residential development.

* * *

(g) To promote the most desirable use of land and direction of building development in accord with a well-considered plan, to promote stability of manufacturing and related development, to strengthen the economic base of the City, to protect the character of the district and its peculiar suitability for particular uses, to conserve the value of land and buildings, and to protect the City's tax revenues.

41-10 PURPOSES OF SPECIFIC MANUFACTURING DISTRICTS

41-11

M1 Light Manufacturing Districts (High Performance)

These districts are designed for a wide range of manufacturing and related uses which can conform to a high level of performance standards. Manufacturing establishments of this type, with completely enclosed buildings, provide a buffer between Residence (or Commercial) Districts and other industrial uses which involve more objectionable influences. New residential development is excluded from these districts, except for joint living-work quarters for artists in M1-5A and M1-5B Districts and dwelling units in M1-5M and M1-6M Districts, both to protect residences from an undesirable environment and to ensure the reservation of adequate areas for industrial development.

* * *

D. SPECIAL USES IN M1-5A and M1-5B DISTRICTS

1. *Joint living-work quarters for artists* in *buildings* in M1-5A and M1-5B Districts provided:

   (a) Such *building* was erected prior to December 15, 1961.

   (b) The *lot coverage* of such *building* does not exceed 5,000 square feet except that in *buildings* with frontage along Broadway the *lot coverage* shall not exceed 3,600 square feet. However, such quarters may also be located in a *building* occupying more than 5,000 square feet *of lot area* if the entire *building* was held in

cooperative ownership by artists on September 15, 1970. *Joint living-work quarters for artists* are permitted in other *buildings* or other structures only by special permit of the City Planning Commission pursuant to Section 74-782.

* * *

74-78

Conversions of Non-Residential Buildings

74-781

Modifications by special permit of the City Planning Commission of uses in M1-5A and M1-5B Districts.

In M1-5A and M1-5B Districts the City Planning Commission may, after public notice and hearing and subject to Board of Estimate approval, permit modification of Section 42-14D, 1c, 1d, 2a, or 2b provided that: The Commission finds that the owner of the space, or a predecessor in title, has made a good faith effort to rent such space to a mandated use at fair market rentals. Such efforts shall include but not be limited to: advertising in local and citywide press, listing the space with brokers, notifying the New York City Office of Economic Development, and informing local and citywide industry groups. Such efforts shall have been actively pursued for a period of no less than six months for *buildings* under 3,600 square feet and one year for *buildings* over 3,600 square feet prior to the date of the application for a special permit.

Italicized words are defined in Section 12-10.

74-782

Residential conversion in C6-1G, C6-2G, C6-2M, C6-4M, M1-5M, M1-6M, M1-5A, M1-5B and LMM Districts.

In C6-1G, C6-2G, C6-2M, C6-4M, M1-5M, M1-6M districts, the City Planning Commission, subject to the approval of the Board of Estimate, may permit modification of the requirements of Section 15-21; in M1-5A and M1-5B districts the City Planning Commission, subject to the approval of the Board of Estimate, may permit the modification of the requirements of Section 42-14(D)(1)(b); and in the LMM Special Purpose District the City Planning Commission, subject to the approval of the Board of Estimate, may permit the modification of the requirements of Section 111-103, provided that the Commission finds that:

(a) The conversion will not harm the industrial sector of the City's economy;

(b) The applicant for the Special Permit or a predecessor in title, has made a good faith effort to rent such space to a mandated *use* at fair market rentals. Such effort shall have been actively pursued for a minimum of one year immediately preceding the application. A good faith effort shall include, but not be limited to, advertising in local and citywide press, listing the space with brokers doing business in the industrial real estate market, notifying the New York City Office of Economic Development, and informing local and citywide industry groups. The applicant shall provide records showing the specific efforts to rent such space;

(c) There is sufficient alternative space to meet the needs of *commercial* and manufacturing uses in the area. The vacancy rate for industrial space in the area shall be one evidentiary element to prove the availability of alternative space;

(d) City, state and federal economic development programs, to the extent applicable, had been explored and found not suitable;

(e) The *commercial* and industrial tenants were given the opportunity by the applicant or predecessor in title to remain in the spaces at fair market rentals, and the property owner or predecessors in title did not cause the vacating of the space for the additional conversions;

(f) The neighborhood in which the conversion is taking place will not be excessively burdened by increased *residential* activity; and

(g) All *dwelling units* or *joint living-work quarters for artists* permitted by this special permit meet the standards of the applicable district for such units or quarters.

If the Commission determines that *floor area* in the *building*, or portion thereof, was occupied as *dwelling units* or *joint living-work quarters for artists* on September 1, 1980, findings (b), (c), (d), and (e) shall not be required for the grant of a special permit for such *floor area*, provided that a complete application to prove occupancy as a *dwelling unit* or *joint living-work quarters for artists* is submitted to the City Planning Commission by the owner of the *building* or the occupant of a *dwelling unit* or *joint living-work quarters for artists* in such *building* not later than June 21, 1983. In

addition, the Commission must find that there is no substantial evidence that the landlord forced *commercial* or *manufacturing* tenants to vacate such *floor area* through harassment, non-renewal of leases, or the charging of rents in excess of the then fair market value. Notwithstanding anything to the contrary above, the Commission shall not grant or deny a special permit pursuant to the provisions of this Section unless an application for such special permit has been submitted by the owner of the *building*.

The Commission shall request a report from the Office of Economic Development regarding information useful in making findings (a), (b), (c), (d) and (e). Said report is to be provided within 30 days of the Commission's request.

The applicants shall provide a copy of any application for a special permit under this Section to the *Industrial Loft Advisory Council* c/o Mayor's Office of Economic Development.

In granting the special permit under this Section, the Commission shall require the preservation of the maximum amount of *floor area* for *commercial* or *manufacturing uses* that the Commission deems feasible.

12-10 (continued)

Joint Living-Work Quarters for Artists

A "joint living-work quarters for artists" consists of one or more *rooms* in a non-*residential building*, on one or more floors, with lawful cooking space and sanitary facilities meeting the requirements of the Housing Maintenance Code, occupied:

(a) and arranged and designed for use by, and used by, not more than four non-related *artists*, or an *artist* and his

household, and including adequate working space reserved for the *artist*, or *artists* residing therein;

(b) by any household residing therein on September 15, 1986 whose members are all unable to meet the *artist* certification qualifications of the Department of Cultural Affairs that registers with the Department of Cultural Affairs prior to nine months from January 8, 1987; or

(c) by any person who is entitled to occupancy by any other provision of law.

An *artist* is a person so certified by the New York City Department of Cultural Affairs.

Regulations governing *joint living-work quarters for artists* are set forth in Article 1, Chapter 5, Section 42-14D (Use Group 17—Special Uses), Section 43-17 (Special Provisions for Joint Living-Work Quarters for Artists) Section 74-78 (Conversions of Non-Residential Buildings), Section 42-141 (Modification by Certification of the City Planning Commission of Uses in M1-5A and M1-5B Districts) and Article XI, Chapter 1 (Special Lower Manhattan Mixed Use District).

* * *

NUMBER XXXIX

THE FEDERALIST

THE CONFORMITY OF THE PLAN TO REPUBLICAN PRINCIPLES:

* * *

... Could any further proof be required of the republican complexion of this system, the most decisive one might be found in its absolute prohibition of titles of nobility, both under the federal and the State governments; and in its express guaranty of the republican form to each of the latter . . .

* * *

PUBLIUS [Madison]

* * *

NUMBER XLIV

THE SAME VIEW CONTINUED AND CONCLUDED

... Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights; and I am much deceived if they have not, in so doing, as faithfully consulted the genuine

sentiments as the undoubted interests of their constituents. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community. They have seen, too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society. The prohibition with respect to titles of nobility is copied from the Articles of Confederation and needs no comment.

* * *

PUBLIUS [Madison]

* * *

NUMBER LXXXIV

CONCERNING SEVERAL MISCELLANEOUS OBJECTIONS

* * *

The establishment of the writ of *habeas corpus*, the prohibition of *ex post facto* laws, and of TITLES OF NOBILITY, *to which we have no corresponding prohibition in our Constitution,* are perhaps greater securities to liberty and republicanism than any it contains. The creation of crimes after the commission of the fact, or in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law, and the practice of arbitrary

imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny. The observations of the judicious Blackstone, in reference to the latter, are well worthy of recital: "To bereave a man of life [says he] or by violence to confiscate his estate,

* * *

hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a *more dangerous engine* of arbitrary government."[78]

* * *

... Nothing need be said to illustrate the importance of the prohibition of titles of nobility. This may truly be denominated the cornerstone of republican government; for so long as they are excluded there can never be serious danger that the government will be any other than that of the people. ...

* * *

PUBLIUS [Hamilton]

NUMBER LXXXV

CONCLUSION

* * *

The additional securities to republican government, to liberty, and to property, to be derived from the adoption of the plan under consideration, consist chiefly in the restraints which

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[78] Sir William Blackstone (1723-80) published his *Commentaries on the Laws of England* between 1765 and 1769. It soon became the basic text in Anglo-American legal and constitutional circles. [Ed.]

the preservation of the Union will impose on local factions and insurrections, and on the ambition of powerful individuals in single States who might acquire credit and influence enough from leaders and favorites to become the despots of the people; in the diminution of the opportunities to foreign intrigue, which the dissolution of the Confederacy would invite and facilitate; in the prevention of extensive military establishments, which could not fail to grow out of wars between the States in a disunited situation; in the express guaranty of a republican form of government to each; in the absolute and universal exclusion of titles of nobility; and in the precautions against the repetition of those practices on the part of the State governments which have undermined the foundations of property and credit, have planted mutual distrust in the breasts of all classes of citizens, and have occasioned an almost universal prostration of morals.

* * *

PUBLIUS [Hamilton]

New York City Loft Board
116 Nassau Street - 11th Floor
New York, NY 10038

INTERIM MULTIPLE DWELLING REGISTRATION RENEWAL APPLICATION

Building Address

House No.	Street Name	Boro	Tax Block	Tax Lot

Applicant's Mailing Address

A. Landlord's Statement and Certification

I certify, under penalties provided by law, including fine and/or imprisonment, that:

1. The information provided previously on the "IMD Registration Application - Part A" and "RIDER" for the above building remains true and correct, except for those changes indicated below;

2. I am maintaining and will continue all minimum housing maintenance standards required by Loft Board regulations;

3. I will provide the Loft Board with such additional information as it requires in the processing of applications; and

4. All statements made herein are true and correct.

_____
PRINT NAME OF SIGNATORY

_____
SIGNATURE OF OWNER, OFFICER
OF CORPORATION, OR LESSEE

_____
TITLE

_____
DATE

Changes to information on "IMD Registration Application - Part A" and "RIDER." (Such as additional residential units not originally noted, change of ownership, etc.)

(If more space is required, attach signed additional sheets, showing building address on each.)

B. IMD Registration Renewal

Complete only items 1-3 below. Two copies of the Registration Renewal will be returned to you upon completion of the re-registration process. One copy must be posted in the IMD at the main entrance at the street level within five (5) business days of receipt.

Interim Multiple Dwelling Registration Renewal

1. Building Address_____ _____
   (Include Borough
   and Zip Code)_____

2. Owner's Name_____

3. Managing Agent's Name_____
   (If any)

(For Loft Board Use Only)

IMD Number_____

Expiration Date_____

Issue Date_____

LOFT BOARD

Notice of Promulgation of and Opportunity to Comment on New Rules Relating to Registration Of Interim Multiple Dwellings and Minimum Housing Maintenance Standards for Interim Multiple Dwellings Addressing Conditions Dangerous to Human Life and Safety

Pursuant to Section 1105 of the New York City Charter and by virtue of the authority vested in me as Chairman of the New York City Loft Board by Mayor's Executive Order No. 66 the following Rules Relating to Registration of Interim Multiple Dwellings and Minimum Housing Maintenance Standards for Interim Multiple Dwellings Addressing Conditions Dangerous to Human Life and Safety are hereby promulgated to be immediately effective.

NOTICE IS HEREBY GIVEN,
PURSUANT TO SUBDIVISION E OF
SECTION 1105 OF THE CITY CHARTER, THAT interested persons may comment in writing on the following Rules, which are effective immediately. Written comment regarding the Rules may be submitted to the undersigned, addressed to him at his office at 116 Nassau Street, New York, NY 10038 not later than January 5, 1983. Comments will be duly considered prior to the promulgation of permanent regulations on this matter.

Section 1 *Definitions*

A. *Landlord* - As used in these emergency regulations, the term "landlord" shall mean the owner of an interim multiple dwelling, the lessee of a whole building part of

which is an interim multiple dwelling, or the agent or other person having control of such a dwelling.

B. *Residential Occupant* - As used in these emergency regulations, the term "residential occupant" shall mean an occupant of an interim multiple dwelling qualified for protection under Article 7-C of the New York State Multiple Dwelling Law.

Section 2 *Registration of Interim Multiple Dwellings*

A. The following "Information and Instruction to Owners, Lessees and Agents of Presumptive Interim Multiple Dwellings" and "Interim Multiple Dwelling Registration Application - Part "A" constitute the procedures for registration of Interim Multiple Dwellings pursuant to Section 284(2) of Article 7-C of the New York State Multiple Dwelling Law:
(See separate Form and Instructions)

* * *

Section 3 *Minimum Housing Maintenance Standards For Interim Multiple Dwellings*

A. Landlords of interim multiple dwellings shall provide the following minimum housing maintenance services to residential occupants qualified for the protection of Article 7-C of the Multiple Dwelling Law:

1. *Water Supply and Drainage* - . . .

2. *Heat* - . . .

* * *

E. It is the objective of the Loft Board that residential occupants receive heat seven days a week. The Board will

mandate such services, through additional and expanded rules and regulations, as buildings move toward legalization.

3. *Hot Water - . . .*

4. *Electricity - . . .*

5. *Gas - . . .*

6. *Smoke Detectors - . . .*

7. *Public Lighting - . . .*

8. *Entrance Door Security - . . .*

9. *Elevator Service - . . .*

* * *

EXPLANATION

In June 1982 a new Article 7-C of the Multiple Dwelling Law was enacted. Article 7-C provides a framework whereby most of the City's living lofts will be brought up to minimum health and safety standards as well as brought under a system of rent regulation and minimum housing maintenance standards. Article 7-C required the Mayor to appoint a Loft Board to oversee this process. The Mayor established the Loft Board, pursuant to Executive Order No. 66, on September 30, 1982. Section 284(2) of Article 7-C requires owners, lessees of whole buildings and agents of interim multiple (i.e. applicable non-residential loft buildings) to file with the Loft Board a notice in conformity with Section 325 of the Multiple Dwelling Law and with rules and regulations promulgated by the Loft Board. This Rule, which establishes an emergency filing procedure and application, conforms to MDL Section 325 while making additions in several important respects. It permits owners, lessees and agents to file with the Loft Board without

waiving their rights to contest coverage before the Loft Board. Those wishing to contest coverage, however, must do so by letter within 30 days of the issuance of the IMD registration number and so inform their occupants. Second, owners, lessees and agents are required to submit the current, or more recent lease for each residentially occupied unit along with IMD Registration Applications. All identifying information on these leases will be kept confidential. Third, those who file for IMD registration will agree to provide the minimum housing maintenance standards established by the Loft Board to all residentially occupied units.

Article 7-C, Section 282 authorizes the Loft Board to establish, after public hearings, minimum housing maintenance standards in interim multiple dwellings. The Loft Board held public hearings concerning minimum housing maintenance standards on October 27, 1982 and November 10, 1982. Landlords, tenants and concerned citizens testified. The failure to provide and maintain the standards regarding water, utilities, hot water, heat and other services required pursuant to this Rule constitute a condition dangerous to human life and safety.

A procedure for landlords or interim multiple dwellings to file with the Loft Board is necessary so that the Board, and other City agencies, may determine which buildings are subject to Article 7-C of the Multiple Dwelling Law and which residential occupants are subject to the protections of said Article 7-C including the housing maintenance standards required by this Rule.

FINDING AND STATEMENT

As Chairman of the New York City Loft Board, I find that the imminent peril to the public health and safety caused by the existence of unsafe conditions in interim multiple dwellings and the absence of a filing system permitting the efficient identification of such interim multiple dwellings, requires

adoption of the foregoing Rule and that the observance of the requirement of notice and opportunity for comment in writing would be contrary to the public interest. The foregoing Rule is therefore adopted to become effective on the date of publication in the City Record.

Dated: November 20, 1982
Filed with the City Clerk: November 30, 1982

s/s Carl Weisbrod
CARL B. WEISBROD
Chairman

9. *Elevator Service* - The landlord shall not diminish nor permit the diminution of legal freight and/or passenger elevator service and shall cause said service to be maintained in good working order.

B. In addition to those services mandated by subdivision 3(A) of this Rule, owners, lessees of whole buildings and agents shall maintain and shall continue to provide to residential occupants services specified in their lease or rental agreement. In the absence of a lease or rental agreement, owners, lessees of whole buildings and agents shall provide those services to residential occupants which were specified in the lease or rental agreement most recently in effect in addition to those services mandated in subdivison 3(A) of this Rule. There shall be diminution of service. Nothing contained in this rule allows reduction in the require level of service.

C. The services mandated by subdivision 3(A) and 3(B) of this rule shall provide a standard which courts can use as part of their determination as to whether registered parties are meeting their current and future responsibilities to residential loft occupants according to the Warranty of Habitability *(Real Property Law Section* 235-b(1)) for interim multiple dwellings, until such time as this Rule is amended or modified by the Loft Board.

EXPLANATION

In June 1982 a new Article 7-C of the Multiple Dwelling Law was enacted. Article 7-C provides a framework whereby most of the City's living lofts will be brought up to minimum health and safety standards as well as brought under a system of rent regulation and minimum housing maintenance standards. Article 7-C required the Mayor to appoint a Loft Board to oversee this process. The Mayor established the Loft Board, pursuant to Executive Order No. 66, on September 30,

1982. Section 284(2) of Article 7-C requires owners, lessees of whole buildings and agents of interim multiple (i.e. applicable non-residential loft buildings) to file with the Loft Board a notice in conformity with Section 325 of the Multiple Dwelling Law and with rules and regulations promulgated by the Loft Board. This Rule, which establishes an emergency filing procedure and application, conforms to MDL Section 325 while making additions in several important respects. It permits owners, lessees and agents to file with the Loft Board without waiving their rights to contest coverage before the Loft Board. Those wishing to contest coverage, however, must do so by letter within 30 days of the issuance of the IMD registration number and so inform their occupants. Second, owners, lessees and agents are required to submit the current, or more recent lease for each residentially occupied unit along with IMD Registration Applications. All identifying information on these leases will be kept confidential. Third, those who file for IMD registration will agree to provide the minimum housing maintenance standards established by the Loft Board to all residentially occupied units.

Article 7-C, Section 282 authorizes the Loft Board to establish, after public hearings, minimum housing maintenance standards in interim multiple dwellings. The Loft Board held public hearings concerning minimum housing maintenance standards on October 27, 1982 and November 10, 1982. Landlords, tenants and concerned citizens testified. The failure to provide and maintain the standards regarding water, utilities, hot water, heat and other services required pursuant to this Rule constitute a condition dangerous to human life and safety.

A procedure for landlords or interim multiple dwellings to file with the Loft Board is necessary so that the Board, and other City agencies, may determine which buildings are subject to Article 7-C of the Multiple Dwelling Law and which residential occupants are subject to the protections of said

Article 7-C including the housing maintenance standards required by this Rule.

FINDING AND STATEMENT

As Chairman of the New York City Loft Board, I find that the imminent peril to the public health and safety caused by the existence of unsafe conditions in interim multiple dwellings and the absence of a filing system permitting the efficient identification of such interim multiple dwellings, requires adoption of the foregoing Rule and that the observance of the requirement of notice and opportunity for comment in writing would be contrary to the public interest. The foregoing Rule is therefore adopted to become effective on the date of publication in the City Record.

Dated: November 20, 1982
Filed with the City Clerk: November 30, 1982

s/s Carl Weisbrod
CARL B. WEISBROD
Chairman

LOFT BOARD

Notice of Promulgation of and Opportunity to Comment on New Rules Relating to Registration Of Interim Multiple Dwellings and Minimum Housing Maintenance Standards for Interim Multiple Dwellings Addressing Conditions Dangerous to Human Life and Safety

Pursuant to Section 1105 of the New York City Charter and by virtue of the authority vested in me as Chairman of the New York City Loft Board by Mayor's Executive Order No. 66 the following Rules Relating to Registration of Interim Multiple Dwellings and Minimum Housing Maintenance Standards for Interim Multiple Dwellings Addressing Conditions Dangerous to Human Life and Safety are hereby promulgated to be immediately effective.

NOTICE IS HEREBY GIVEN,
PURSUANT TO SUBDIVISION E OF
SECTION 1105 OF THE CITY CHARTER, THAT interested persons may comment in writing on the following Rules, which are effective immediately. Written comment regarding the Rules may be submitted to the undersigned, addressed to him at his office at 116 Nassau Street, New York, New York 10038 not later than January 5, 1983. Comments will be duly considered prior to the promulgation of permanent regulations on this matter.

Section 1 *Definitions*

A. *Landlord* - As used in these emergency regulations, the term "landlord" shall mean the owner of an interim multiple dwelling, the lessee of a whole building part of

which is an interim multiple dwelling, or the agent or other person having control of such a dwelling.

B. *Residential Occupant* - As used in these emergency regulations, the term "residential occupant" shall mean an occupant of an interim multiple dwelling qualified for protection under Article 7-C of the New York State Multiple Dwelling Law.

Section 2 *Registration of Interim Multiple Dwellings*

A. The following "Information and Instruction to Owners, Lessees and Agents of Presumptive Interim Multiple Dwellings" and "Interim Multiple Dwelling Registration Application - Part "A" constitute the procedures for registration of Interim Multiple Dwellings pursuant to Section 284(2) of Article 7-C of the New York State Multiple Dwelling Law:

N.Y.C. LOFT BOARD
116 NASSAU STREET
NEW YORK, NY 10038
PHONE: 566-1438

INFORMATION AND INSTRUCTIONS
TO OWNERS, LESSEES AND AGENTS
OR PRESUMPTIVE INTERIM MULTIPLE DWELLINGS

A new state law, Article 7-C of the Multiple Dwelling Law, effective June 21, 1982, required the establishment of a New York City Loft Board to oversee the legalization of residential lofts. The law defines as "interim multiple dwelling" a building in an area which allows residential use, which: (1) at any time was occupied for manufacturing, commercial or warehouse purposes; (2) lacks a certificate of occupancy for residential use; and (3) on December 1, 1981 had at least three residentially occupied units since April 1, 1980. The law also identifies the structure and functions of the Board and the rights and obligations of residential occupants and landlords.

Section 284(2) requires the registration of all interim multiple dwellings. These instructions and the attached form are being sent to, or are available to, landlords of buildings which are believed to be interim multiple dwellings. (See 4. below.) If any additional forms are required for other buildings, or if there are any questions, contact the above office.

INSTRUCTIONS - INTERIM MULTIPLE DWELLING REGISTRATION APPLICATION - PART A.

1. PRINT, using black ink only, all information in completing this form. Detach this Information and Instruction sheet and RETURN copies of this form, when completed, to:

"IMD" REGISTRATION
NEW YORK CITY LOFT BOARD
116 NASSAU STREET - 12th FLOOR
NEW YORK, NEW YORK 10038

Registration forms must be filed for all Interim Multiple Dwellings by January 31, 1983.

2. The information requested on the attached form is required pursuant to Sections 284(2) and 325 of the New York State Multiple Dwelling Law. Additional information may be required pursuant to rule and regulations which shall be promulgated by the New York City Loft Board.

3. NO FEE is required at this time. However, a fee may be imposed if registration forms are filed after January 31, 1983. A registration fee, to maintain effective registration, may be established by the LOFT BOARD pursuant to Section 282 of the Multiple Dwelling Law.

* * *

8. This application must be completed in its entirety. Legible copies of the current lease or, where there is no current lease, the most recent lease agreement (including all executed riders, amendments, modifications and extensions) for all residentially occupied units must be attached regardless of the commercial, residential, or manufacturing nature of the lease. All personal and confidential information on leases will not be available under the Freedom of Information Act. The application will not be accepted, and a registration number will NOT be assigned, unless ALL questions are answered in full and all required leases are attached. If a particular question or piece of information is inapplicable, enter NOT APPLICABLE. The contest of the application will be reviewed prior to acceptance.

* * *

11. All owners, lessees of whole buildings, and agents or other persons having control of the premises who file for I.M.D. Registration Numbers agree to provide the minimum housing maintenance standards established or to be established by the Loft Board to all residentially occupied units for as long as the I.M.D. Registration Number is valid, provided however, that an I.M.D. Registration Number shall not be deemed invalid solely if a residential occupant shall withhold the payment of any rent then due.

* * *

13. An identification sign containing the building, address, the interim dwelling registration number assigned by the Loft Board for the purpose of identifying the building and the owner and managing agent shall be posted in every interim multiple dwelling within five (5) business days after the issuance of the I.M.D. Registration Number. The manner and location of the sign must comply with rules prescribed by the

Department of Housing Preservation and Development's Code Enforcement Division for posting.

Section 3 *Minimum Housing Maintenance Standards For Interim Multiple Dwellings*

A. Landlords of interim multiple dwellings shall provide the following minimum housing maintenance services to residential occupants qualified for the protection of Article 7-C of the Multiple Dwelling Law:

1. *Water Supply and Drainage -*

* * *

2. *Heat*

* * *

3. *Hot Water*

* * *

4. *Electricity*

* * *

5. *Gas*

* * *

6. *Smoke Detectors*

* * *

7. *Public Lighting*

* * *

8. *Entrance Door Security*

* * *

9. *Elevator Service*

* * *

Article 7-C, Section 282 authorizes the Loft Board to establish, after public hearings, minimum housing maintenance standards in interim multiple dwellings. The Loft Board held public hearings concerning minimum housing maintenance standards on October 27, 1982 and November 10, 1982. Landlords, tenants and concerned citizens testified. The failure to provide and maintain the standards regarding water, utilities, hot water, heat and other services required pursuant to this Rule constitute a condition dangerous to human life and safety.

A procedure for landlords or interim multiple dwellings to file with the Loft Board is necessary so that the Board, and other City agencies, may determine which buildings are subject to Article 7-C of the Multiple Dwelling Law and which residential occupants are subject to the protections of said Article 7-C including the housing maintenance standards required by this Rule.

FINDING AND STATEMENT

As Chairman of the New York City Loft Board, I find that the imminent peril to the public health and safety caused by the existence of unsafe conditions in interim multiple dwellings and the absence of a filing system permitting the efficient identification of such interim multiple dwellings, requires adoption of the foregoing Rule and that the observance of the requirement of notice and opportunity for comment in writing would be contrary to the public interest. The foregoing Rule is therefore adopted to become effective on the date of publication in the City Record.

Dated: November 20, 1982
Filed with the City Clerk: November 30, 1982

/s/_____
CARL B. WEISBROD
Chairman

LOFT BOARD

Rules and Regulations

Pursuant to Section 1105 of the New York City Charter, Article 7-C of the Multiple Dwelling Law, and Mayor's Executive Order No. 66, the New York City Loft Board hereby promulgates the following Rules and Regulations Relating to Registration of Interim Multiple Dwellings and Minimum Housing Standards for Interim Multiple Dwellings.

Section 1 *Definitions*

A. *Landlord* -

As used in these regulations, the term "landlord" shall mean the owner of an interim multiple dwelling, the lessee of a whole building part of which is an interim multiple dwelling, or the agent or other person having control of such a dwelling.

B. *Residential Occupant* -

As used in these regulations, the term "residential occupant" shall mean an occupant of an interim multiple dwelling eligible for protection under Article 7-C of the New York State Multiple Dwelling Law.

Section 2 *Registration of Interim Multiple Dwellings*

A. The following "Information and Instruction to Owners, Lessees and Agents of Interim Multiple Dwellings" constitute the procedures for registration of Interim Multiple Dwellings pursuant to Section 284(2) of Article 7-C of the New York State Multiple Dwelling Law. Applications for registration shall be in a form promulgated by the Loft Board.

New York City Loft Board
116 Nassau Street
New York, NY 10038
566-1438

INFORMATION AND INSTRUCTIONS TO OWNERS, LESSEES AND AGENTS OF INTERIM MULTIPLE DWELLINGS

A new state law, Article 7-C of the Multiple Dwelling Law, effective June 21, 1982, required the establishment of a New York City Loft Board to foresee the legalization of residential lofts. The law defines as an "interim multiple dwelling" a building or a portion thereof in an area which allows residential use, which: (1) at any time was occupied for manufacturing, commercial or warehouse purposes; (2) on December first, nineteen hundred eighty-one was occupied for residential purposes since April first, nineteen hundred eighty as the residence or home of any three or more families living independently of one another; and (3) lacks a certificate of compliance or occupancy pursuant to section three hundred one of the Multiple Dwelling Law. In addition, in an interim multiple dwelling residential occupants in units first occupied after April 1, 1980 and prior to April 1, 1981 shall be qualified for protection pursuant to Article 7-C. A reduction in the number of occupied residential units in a building after December 1, 1981 shall not eliminate the protections of Article 7-C for any remaining residential occupants qualified for such protections.

Section 284(2) requires the registration of all interim multiple dwellings. These instructions are being sent to, or are available to, landlords of buildings which are believed to be interim multiple dwellings. (See 4. below.) If additional forms are required for other buildings, or if there are any questions, contact the above office.

INSTRUCTIONS - INTERIM MULTIPLE DWELLING REGISTRATION APPLICATION - PART A

1. PRINT, using black ink only, all information in completing the registration form. Detach this Information and Instruction sheet and RETURN copies of the form, when completed, to:

"I.M.D." REGISTRATION
NEW YORK CITY LOFT BOARD
116 NASSAU STREET
NEW YORK, NEW YORK 10038

Registration forms must be filed for all Interim Multiple Dwellings by January 31, 1983 to avoid payment of an initial registration fee.

* * *

8. *APPLICATIONS MUST BE COMPLETED IN ITS ENTIRETY. LEGIBLE COPIES OF THE CURRENT LEASE OR, WHERE THERE IS NO CURRENT LEASE, THE MOST RECENT LEASE AGREEMENT (INCLUDING ALL EXECUTED RIDERS, AMENDMENTS, MODIFICATIONS AND EXTENSIONS) FOR ALL RESIDENTIALLY OCCUPIED UNITS MUST BE ATTACHED REGARDLESS OF THE COMMERCIAL, RESIDENTIAL, OR MANUFACTURING NATURE OF THE LEASE. IF NO LEASE EXISTS OR EXISTED, ATTACH A SIGNED STATEMENT OUTLINING THE MOST RECENT RENTAL AGREEMENT.*

* * *

AN APPLICATION WILL NOT BE ACCEPTED, AND AN IMD REGISTRATION NUMBER WILL NOT BE ASSIGNED, UNLESS ALL QUESTIONS ARE ANSWERED IN FULL AND ALL REQUIRED LEASES ARE

ATTACHED. If a particular question or piece of information is inapplicable or not available enter NOT APPLICABLE and attach a signed statement explaining the reasons. The content of an application will be reviewed prior to acceptance.

* * *

If the owner, lessee, agent or other person is a corporation, other than a corporation listed as exempt from the provisions of the Multiple Dwelling Law § 325, the names, business and residence addresses and phone numbers of its officers must be listed on the form.

Other officers, including treasurer or chief fiscal officer, and stockholders who own or control at least 10% of the corporation's stock must be listed on a separate attachment.

If the owner, lessee, agent or other person is other than an individual or a corporation, the names, business and residential addresses and phone numbers for each general partner or participant in a partnership or joint venture must be listed on a separate attachment.

AT LEAST ONE OF THE PHONE NUMBERS ENTERED ON THE FORM MUST BE A CONFIDENTIAL TELEPHONE NUMBER WHERE A RESPONSIBLE PARTY CAN REASONABLY BE EXPECTED TO BE REACHED AT ALL TIMES FOR EMERGENCIES. SUCH NUMBER(S) MUST BE WITHIN 50 MILES RADIUS OF NEW YORK CITY LIMITS AND MUST BE INDICATED ON A SEPARATE SIGNED SHEET OF PAPER AND ATTACHED TO THE APPLICATION.

11. All owners, lessees of whole buildings, and agents or other persons having control of the premises who file for I.M.D. Registration Numbers agree to provide the minimum housing maintenance standards established or to be

established by the Loft Board to all residentially occupied units for as long as the I.M.D. Registration Number is valid.

* * *

B. Landlords of interim multiple dwellings for which an IMD Registration Number has been issued, shall be deemed to be compliance with the registration provisions of Article 7-C and shall be entitled to claim rents becoming due after the date of issuance of the IMD Registration Number, in summary proceedings, pursuant to Section 285(1) of Article 7-C of the Multiple Dwelling Law.

Finding that there are a significant number of ongoing disputes between landlords and residential occupants in loft dwellings over payment of past due rents and that Article 7-C did not intend to authorize landlords to recover past due rents from residents occupying premises which may not qualify for coverage under Article 7-C, the Loft Board believes that landlords' right to recover for past due rents pursuant to Section 285(1) of the Multiple Dwelling Law should be stayed until the question of coverage of an IMD has been resolved.

Landlords who waive their right to contest coverage by executing a written waiver in a form acceptable to the Loft Board or whose coverage dispute has been resolved by a determination that the premises in question are covered by Article 7-C and who have met the requirements of subdivision 2(A) of this rule shall be deemed in full compliance with the registration provisions of Article 7-C in order to claim past due rent payable from residential occupants pursuant to Section 285(1) of the Multiple Dwelling Law.

* * *

Section 284(2) of Article 7-C requires owners, lessees of whole buildings and agents of interim multiple dwellings (i.e. applicable non-residential loft buildings) to file with the Loft

Board a notice in conformity with Section 325 of the Multiple Dwelling Law and with rules and regulations promulgated by the Loft Board. This Rule, which established filing procedures conforms to MDL Section 325 while making additions in several important respects.

* * *

Second, owners, lessees and agents are required to submit the current, or most recent lease for each residentially occupied units along with IMD Registration Applications. All identifying information on these leases will be kept confidential. Third, those who file for IMD registration will agree to provide the minimum housing maintenance standards established by the Loft Board to all residentially occupied units.

Article 7-C, Section 282 authorizes the Loft Board to establish, after public hearings, minimum housing maintenance standards in interim multiple dwellings. The Loft Board held public hearings concerning minimum housing maintenance standards on October 27, 1982 and November 10, 1982. Landlords, tenants and concerned citizens testified.

I do hereby certify that good cause exists for waiving the requirement that thirty days shall first elapse after publication in THE CITY RECORD and that the foregoing Regulations shall become effective on the date of publication.

Dated: January 27, 1983
Filed with the City Clerk: January 27, 1983

/s/
CARL B. WEISBROD
Chairman

R-1

INTERIM MULTIPLE DWELLING REGISTRATION
APPLICATION - PARTY A

READ INSTRUCTIONS ON LAST PAGE BEFORE
COMPLETING FORM

Building Address 640 Broadway, New York, N.Y.

Expiration Date

PHN St. Code IMD Reg. No.

640 13610

Issue Date

For Loft Board Use Only

House No.	Street Name	Boro	Tax Block	Tax Lot
640	Broadway	Man	522	14

APPLICANT'S MAILING ADDRESS

640 Broadway Renaissance Co.
Suite 8000
644 Broadway
New York, New York 10012

Number of Residentially Occupied Units 17.

Number of Floors in Building 9.

Floor	No. of Res. Occ. Units	Floor	No. of Res. Occ. Units
2	2	6	2
3	2	7	2
4	2	8	3
5	2	9	2

This Registration Application is being filed by :

Owner X Lessee ____ Other (Describe) ____

Owner/Lessee/Other (If Corp. give Name and Employee Ident. No.) 640 Broadway Renaissance Co. Ident. No. _____

Business Address 644 Broadway Suite 8000
New York, New York 10012 Phone No. (212)477-0100

If registration is being filed by a corporation, complete this section.

OFFICERS OF CORPORATION FILING THIS REGISTRATION

NAME	ADDRESS	PHONE
President	Bus.	
	Home	
Vice President	Bus.	
	Home	
Secretary	Bus.	
	Home	

Managing Agent
(Natural Person Only) George N. Peters

Business Address — Phone No.
644 Broadway — (212) 477-0100
New York, New York 10012

Home Address — Phone No.
96 Knickerbocker Road
Englewood, N.J.

I CONSENT TO THE DESIGNATION AS MANAGING AGENT OF THE ABOVE PREMISES

X s/s 1/31/83
Signature of Managing Agent Date

TO THE OWNER REGISTERING:

If this whole building is leased, give Lessee's Name and Address, (if corporation, give Corporation's Name and Address):

SEE RIDER ANNEXED HERETO AND MADE PART HEREOF

Phone No.

Phone No.

I CERTIFY, UNDER PENALTIES PROVIDED BY LAW, INCLUDING FINE AND/OR IMPRISONMENT, THAT ALL STATEMENTS MADE HEREIN ARE TRUE AND CORRECT.

640 BROADWAY RENAISSANCE CO.

MARTIN R. FINE	s/s Martin R. Fine	1/31/83
Print Name of Signatory	Signature of Owner, Officer of Corporation, or Lessee	Date

RIDER ANNEXED TO AND MADE PART OF INTERIM MULTIPLE DWELLING REGISTRATION APPLICATION

THIS INTERIM MULTIPLE DWELLING REGISTRATION APPLICATION IS BEING FILED UNDER PROTEST AND UNDER DURESS.

Article 7C of the Multiple Dwelling Law, and Section 284(a) of the Multiple Dwelling Law, as it purports to apply to these promises, is unconstitutional and unlawful for numerous reasons including, but not limited to the following:

(1) Article 7C of the Multiple Dwelling Law constitutes an unconstitutional taking of applicant's property without due process of law.

(2) Article 7C of the Multiple Dwelling Law constitutes an impairment of the obligation of contracts of Article 1, Section 10 of the United States Constitution, and Title 42, United States Code, Sec. 1983.

(3) Article 7C of the Multiple Dwelling Law constitutes an unlawful and unconstitutional delegation of legislative authority in violation of the New York State Constitution and the New York City Charter and Administrative Code to a group of private individuals purporting to constitute the "New York City Loft Board".

(4) Article 7C of the Multiple Dwelling Law as it purports to apply to these premises and the Interim Multiple Dwelling Application promulgated by the "New York City Loft Board" constitutes a invasion of privacy and requires information to be supplied by the applicant which constitutes an invasion of privacy and a taking of property without due process of law and without compensation therefor in violation of the New York State and United States Constitutions.

(5) Section 1105 of the New York State Charter and the so-called "Mayor's Executive Order 66" and the purported rules and regulations relating to registration of interim multiple dwellings purportedly promulgated by the New York City Loft Board, Dated November 30, 1982, are unconstitutional, illegal and an unlawful delegation of legislative authority and together constitute an unconstitutional taking of applicant's property without due process of law and without compensation therefore in violation of the New York State and United States Constitutions.

THEREFORE, THIS APPLICATION IS FILED BY 640 BROADWAY RENAISSANCE CO., UNDER PROTEST AND UNDER DURESS, AND DOES NOT CONSTITUTE A WAIVER OF ANY LEGAL OR CONSTITUTIONAL RIGHTS OF APPLICANT.

CHAPTER 5–EMERGENCY TENANT PROTECTION ACT OF NINETEEN SEVENTY-FOUR

* * *

§ 8622. Legislative finding

The legislature hereby finds and declares that a serious public emergency continues to exist in the housing of a considerable number of persons in the state of New York which emergency was at its inception created by war, the effects of war and the aftermath of hostilities, that such emergency necessitated the intervention of federal, state and local government in order to prevent speculative, unwarranted and abnormal increases in rents; that there continues to exist in many areas of the state an acute shortage of housing accommodations caused by continued high demand, attributable in part to new household formations and decreased supply, in large measure attributable to reduced availability of federal subsidies, and increased costs of construction and other inflationary factors; that a substantial number of persons residing in housing not presently subject to the provisions of the emergency housing rent control law[1] or the local emergency housing rent control act[2] are being charged excessive and unwarranted rents and rent increases; that preventive action by the legislature continues to be imperative in order to prevent exaction of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices tending to produce threats to the public health, safety and general welfare; that in order to prevent uncertainty, hardship and dislocation, the provisions of this act are necessary and designed to protect the public health, safety and general welfare; that the transition from regulation to a normal market of free bargaining between landlord and

---

[1] Section 8581 et seq.

[2] Section 8601 et seq.

tenant, while the ultimate objective of state policy, must take place with due regard for such emergency; and that the policy, herein expressed shall be subject to determination of the existence of a public emergency requiring the regulation of residential rents within any city, town or village by the local legislative body of such city, town or village.

(L.1974, c. 576, § 4[§ 2].)

* * *

§ 8625. Housing accommodations subject to regulation

a. A declaration of emergency may be made pursuant to section three as to all or any class or classes of housing accommodations in a municipality, except:

(1) housing accommodations subject to the emergency housing rent control law, or the local emergency housing rent control act, other than housing accommodations subject to the New York city rent stabilization law of nineteen hundred sixty-nine;

(2) housing accommodations owned or operated by the United States, the state of New York, any political subdivision, agency or instrumentality thereof, any municipality or any public housing authority;

* * *

§ 8626. Regulation of rents

a. Notwithstanding the provisions of any lease or other rental agreement, no owner shall, on or after the first day of the first month or other rental period following a declaration of emergency pursuant to section three, which date shall be referred to in this act as the local effective date, charge or collect any rent in excess of the initial legal regulated rent or

adjusted initial legal regulated rent until such time as a different legal regulated rent shall be authorized pursuant to guidelines adopted by a rent guidelines board pursuant to section four.

* * *

§ 8627. Maintenance of services

a. In order to collect a rent adjustment authorized pursuant to the provisions of subdivision b of section four, the owner of housing accommodations subject to this act located in a city having a population of less than one million or a town or village must file with the state division of housing and community renewal on a form which it shall prescribe, a written certification that he is maintaining and will continue to maintain all services furnished on the date upon which this act becomes a law or required to be furnished by any law, ordinance or regulation applicable to the premises.

* * *

b. For cities having a population of one million or more, this act may be implemented by regulations adopted pursuant to the New York city rent stabilization law of nineteen hundred sixty-nine, as amended, or as otherwise provided by law.

* * *

§ 8630-a. Right to sublease

Units subject to this law may be sublet pursuant to section two hundred twenty-six-b of the real property law

* * *

§ 8632-a. Rent registration

a. Each housing accommodation in a city having a population of less than one million or a town or village as to

which an emergency has been declared pursuant to section three of this act which is subject to this act shall be registered by the owner thereof with the state division of housing and community renewal prior to July first, nineteen hundred eighty-four upon forms prescribed by the commissioner of such division.

Chapter 4

RENT STABILIZATION LAW

* * *

§26-501 Findings and declaration of emergency. The council hereby finds that a serious public emergency continues to exist in the housing of a considerable number of persons within the city of New York and will continue to exist after April first, nineteen hundred seventy-four; that such emergency necessitated the intervention of federal, state and local government in order to prevent speculative, unwarranted and abnormal increases in rents; that there continues to exist an acute shortage of dwellings which creates a special hardship to persons and families occupying rental housing; that the legislation enacted in nineteen hundred seventy-one by the state of New York, removing controls on housing accommodations as they become vacant, has resulted in sharp increases in rent levels in many instances; that the existing and proposed cuts in federal assistance to housing programs threaten a virtual end to the creation of new housing, thus prolonging the present emergency; that unless residential rents and evictions continue to be regulated and controlled, disruptive practices and abnormal conditions will produce serious threats to the public health, safety and general welfare; that to prevent such perils to health, safety and welfare, preventive action by the council continues to be imperative; that such action is necessary in order to prevent exactions of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices tending to produce threats to the public health, safety and general welfare; that the transition from regulation to a normal market of free bargaining between landlord and tenant, while still the objective of state and city policy, must be administered with due regard for such emergency; and that the policy herein expressed is now administered locally within the city of New York by an agency of the city itself, pursuant to the authority

conferred by chapter twenty-one of the laws of nineteen hundred sixty-two.

The council further finds that, prior to the adoption of local laws sixteen and fifty-one of nineteen hundred sixty-nine, many owners of housing accommodations in multiple dwellings, not subject to the provisions of the city rent and rehabilitation law enacted pursuant to said enabling authority either because they were constructed after nineteen hundred forty-seven or because they were decontrolled due to monthly rental of two hundred fifty dollars or more or for other reasons, were demanding exorbitant and unconscionable rent increases as a result of the aforesaid emergency, which led to a continuing restriction of available housing as evidenced by the nineteen hundred sixty-eight vacancy survey by the United States bureau of the census; that prior to the enactment of said local laws, such increases were being exacted under stress of prevailing conditions of inflation and of an acute housing shortage resulting from a sharp decline in private residential construction brought about by a combination of local and national factor; that such increases and demands were causing severe hardship to tenants of such accommodations and were uprooting long-time city residents from their communities; that recent studies establish that the acute housing shortage continues to exist; that there has been a further decline in private residential construction due to existing and proposed cuts in federal assistance to housing programs; that unless such accommodations are subjected to reasonable rent and eviction limitations, disruptive practices and abnormal conditions will produce serious threats to the public health, safety and general welfare; and that such conditions constitute a grave emergency.

§26-502 Additional findings and declaration of emergency. The council hereby finds that a serious public emergency continues to exist in the housing of a considerable number of persons within the city of New York and will continue to exist after April first, nineteen hundred eighty-eight

and hereby reaffirms and repromulgates the findings and declaration set forth in section 26-501 of this title.

§ 26-503 Short title. This law may be cited as the rent stabilization law of nineteen hundred sixty-nine.

* * *

§ 26-511

c. A code shall not be adopted hereunder unless it appears to the division of housing and community renewal that such code:

* * *

(4) includes provisions requiring owners to grant a one or two year vacancy or renewal lease at the option of the tenant . . .

* * *

(12) permits subletting of units subject to this law pursuant to section two hundred twenty-six-b of the real property law. . .

EXHIBIT G

640 Broadway - Arrears of Rent and Use & Occupancy
based on expired leases & Current Market Values

UNIT	LAST KNOWN OCCUPANT	AMOUNT DUE THRU 4/30/89	MAY RENT	JUNE RENT	CURRENT MARKET VALUE*
2E	EISNER	$16,049.01	$1,063.59	$1,063.59	$3,125.00
2W	ROSSITER	12,618.85	998.71	998.71	3,125.00
3E	YODER	22,821.35	1,419.35	1,419.35	3,255.00
3W	SEARLES	13,740.08	1,249.37	1,249.37	3,255.00
4E	SOSA	16,085.41	1,087.41	1,087.41	3,385.00
4W	HOLLAND	22,654.90	1,480.52	1,480.52	1,692.50
5E	VIGNOLI	33,992.42	1,123.65	1,123.65	3,515.00
5W	HINMAN	20,166.61	1,216.46	1,216.46	3,515.00
6E	ESCHEL	68,099.10	1,273.08	1,273.08	3,645.00
6W	KRALL	20,670.74	1,310.76	1,310.76	3,645.00

U-1

* Current market value based on comparable monthly rentals at $15.00 to $20.00 per square foot.

7E	HOFFMAN	12,698.33	1,079.35	1,079.35	3,775.00
7W	HOLLOMAN	31,232.86	1,590.63	1,590.63	3,775.00
8E	PELEG	20,918.29	1,089.17	1,089.17	3,905.00
8W	GOODMAN	9,024.94	745.22	745.22	1,952.50
8C	NEPTUNE	11,289.00	700.00	700.00	1,952.50
9E	SMITH	31,291.52	1,312.77	1,312.77	4,035.00
9W	FAQUE	61,550.79	1,316.83	1,316.83	4,035.00
		$424,904.20	$20,056.87	$20,056.87	$55,587.50
		TOTAL	$465,017.94*		

U-2

* Plus additional rent, interest, legal fees and all damages relating to indemnification and other additional rent as set forth in expired leases.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

640 BROADWAY RENAISSANCE COMPANY,	:	
	:	AFFIDAVIT IN
Plaintiff,	:	SUPPORT OF
	:	PLAINTIFF'S
- against -	:	MOTION FOR
	:	SUMMARY
MARIO CUOMO, as Governor of The State of New York, *et al.*,	:	JUDGMENT
	:	
Defendant.	:	

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MARTIN R. FINE, being duly sworn, deposes and says:

* * *

9. Residential use of this building has always been and continues to be illegal for several reasons. First, the certificate of occupancy issued on May 17, 1966, states that this is a commercial building and that its only permissible use is for stores on the street level, and offices and manufacturing on the remaining eight floors. A copy of the certificate of occupancy is annexed hereto as Exhibit D.

10. Second, the building is located in a M1-5B Zone which is defined as a light manufacturing district. According to the Zoning Resolution of the City of New York (hereinafter "ZR"), residential use of buildings in this district is expressly

prohibited in structures erected prior to December 15, 1961 with frontage along Broadway and a lot coverage exceeding 3,600 square feet. (See Exhibit C, Zoning Map and ZR 42-14(D)(1)(b)).

* * *

13. It is also an undeniable fact that 640 Broadway is not structurally suited as a multiple dwelling. In order to make the building suitable for residential use, major structural changes would be required, including the installation of fireproof walls, stairways and fire escapes, as well as the installation of new elevators and substantially new plumbing, heating and electrical systems. In addition, the Owner would have to comply with a myriad of City and State laws which only apply to the operation of residential buildings, but not to commercial buildings.

14. For instance, the owners of new and rehabilitated apartments must now comply with the drastic requirements of the *Handicapped Access Law* (N.Y.C. Local Law 58) which would in and of itself, require the expenditure of staggering sums of money to rebuild the building to make it accessible for the handicapped. Under the existing certificate of occupancy, the Owner would not have to undertake these major changes.

15. The building is presently in compliance with all of the applicable provisions of the building code and the zoning regulations which govern its use for commercial, office and manufacturing purposes.[1] The plaintiff wants to continue to use the building for commercial rentals, which is the only use permitted *as of right* in the zoning district in which the building is located, and under the *building's existing certificate of occupancy*.

16. At the time the plaintiff took title to the building in March of 1978, the building was virtually vacant except for a handful of tenants who were engaged in commercial or light

manufacturing enterprises. While there had been illegal residential use prior to plaintiff's purchase, in fact, the plaintiff eliminated such use by removing all the residential tenants after the plaintiff took title.[2]

* * *

18. In each instance, the lease was the product of an arms-length transaction with a well-educated, sophisticated adult who either was represented by, or had access to an attorney. In each instance, the premises were vacant, the occupant who executed the lease had a residence elsewhere and expressly represented to the Owner that the unit would not be used as a residence. The occupants further represented that they knew it was illegal to reside in the building; that they would comply with all laws relating to the use of the premises; and that they would indemnify the Owner and hold it harmless from any claims, penalties, loss, damage or expense, including attorneys fees, incurred because of their illegal use of the premises.

19. The plaintiff had good reason to insist upon each occupant's specific promise that the unit would not be used as a residence. It is a well-known fact that in the late 1970's it became quite chic to live in commercial loft buildings in lower Manhattan. It was to protect the plaintiff from those adventurous individuals who were willing to flaunt the building code and applicable zoning laws, that *this building owner* insisted upon specific written assurances from all prospective tenants that they would use their units solely for commercial

---

[2] The one exception was Joel Hinman, who executed a new lease and assured the Owner that he would discontinue the illegal use of his unit 5W as a residence, and henceforth use it solely for bona fide commercial purposes.

purposes, and would indemnify the plaintiff against all damages resulting from any illegal use. Moreover, their leases specifically required the tenants to pay for the cost of any subsequently required building improvement or changes.

20. Had the prospective tenants not made those specific written representations, the plaintiff never would have entered into any lease agreements with them.

* * *

THE LEASES FOR 640 BROADWAY
PROHIBIT RESIDENTIAL USE

22. The lease executed on May 27, 1982 between the Owner and Phoebe Rentschler and Temple Smith, which is annexed hereto as Exhibit E, is typical of all of the commercial leases executed by the plaintiff for 640 Broadway.

23. The following paragraphs in the lease make it absolutely clear that the premises are to be used solely for commercial purposes and that residential use is strictly prohibited:

a. Paragraph 2 of lease states in its entirety:

> "Tenant shall use and occupy demised premises for Photography Studio and for no other purpose."

b. Paragraph 39 of the lease states in relevant part:

> "Tenant covenants that Tenant will not use of suffer or permit any person to use the demised premises for any unlawful purpose...."

c. Paragraph 58 states:

"Tenant acknowledges that the certificate of occupancy ... for the building does not permit residential occupancy of the premises."

* * *

25. Furthermore, it is abundantly clear from all of the other lease provisions that the premises were rented exclusively for commercial purposes. The following provisions establish the intention of the parties to enter a commercial, and not a residential landlord/tenant relationship:

a. Paragraph 30 of the lease requires the landlord to provide heat and elevator service only on business days from 8 a.m. until 6 p.m. and on Saturdays from 8 a.m. until 1 p.m. The landlord is not required to furnish these services in the evenings, on Saturday afternoons, or on Sundays.

b. Also pursuant to Paragraph 30, the *tenant* is obligated "to pay Landlord the cost of removal of any of tenant's refuse and rubbish from the building; and pursuant to Paragraph 4, the *tenant* is obligated to arrange and pay for the extermination of vermin.

c. Pursuant to Paragraph 41, the *tenant* is obligated to "replace all damaged or broken plate glass or other glass in or about the demised premises."

d. Pursuant to Paragraph 42, the *tenant* at its sole cost and expense shall be solely responsible for and pay for all utilities and/or services used and required by tenant, including electricity and gas and water."

e. Pursuant to Paragraph 39, the *tenant* is obligated to "obtain and maintain at Tenants' sole cost and expense all licenses and permits from any and all governmental authorities having jurisdiction of the demised premises which

may be necessary for the conduct of Tenant's business therein."

f. Pursuant to Paragraph 78, the *tenant* is obligated to maintain a $500,000.00 liability insurance policy in effect for the benefit of the landlord and the tenant.

g. Pursuant to Paragraph 54, the landlord is entitled to periodic rent increases based on the Consumer Price Index.

h. Pursuant to Paragraph 72, *the tenants agreed to accept the demised premises "as is" in its condition at the commencement of the lease term.*

* * *

26. The foregoing provisions are found only in commercial leases. Clearly, these were not residential leases. The plaintiff never agreed to provide those services which are required for residential tenants. In determining the rent, which was freely negotiated, the plaintiff did not factor in the cost of providing residential services, because the leases were commercial, not residential in nature, and because the building was zoned for manufacturing and office use only. Neither did the rents reflect the enormous costs that would be involved in converting the building into a legal multiple dwelling, even if that were legally and structurally possible.

27. Despite their express representations to the contrary, in addition to operating their businesses, the occupants deliberately set up housekeeping and resided in these commercial units in knowing and clear violation of all of these lease provisions, the building's certificate of occupancy, and the applicable zoning laws.

* * *

31. Moreover, my attorneys advise me that these deliberate violations by the occupants constitute a criminal offense under Section 304(1) of the New York State Multiple Dwelling Law, which provides that every person who violates or assists in the violation of the multiple dwelling law shall be guilty of a misdemeanor punishable by fines and/or imprisonment. *N.Y. Mult. Dwell. Law* §304(1) (McKinney 1986).

* * *

33. Besides their illegal residential use, the occupants have violated their leases by their deliberate failure to quit and surrender the premises upon the expiration of their lease terms.

34. All of the leases at issue here were first executed in the period between 1978 and 1982. Each was a standard commercial loft lease which provided for a short term of between two to six years. All of these leases, except one, have expired.[3] Annexed hereto as Exhibit F is a list of the occupants and the execution and expiration dates of their leases.

* * *

Moreover all of the occupants assert the right to reside on the premises indefinitely under the protection of the Loft Law, which, they claim, permits them to live in their units rent free.

36. The occupants have violated their leases in other ways. Primary among these violations is the persistent failure on the part of the occupants to pay rent, rent increases, and/or use and occupancy for their units.

37. Since the determination of the Loft Board, none of the occupants have paid rent. Furthermore, many occupants, in reliance upon the provisions of the Loft Law, stopped paying rent after its enactment. For instance, Hannah Eshel has not

paid rent since October of 1984 and owes an amount in excess of $70,000.00. Other occupants owe amounts ranging from $10,500.00 to $36,000.00. At the present time, the Owner is owed rent, additional rent and/or use and occupancy in the amount of at least $465,017.94 (calculated at the rates called for in the expired leases). Annexed hereto as Exhibit G is a list of the rent arrears for each unit as well as their current market values.

* * *

39. Furthermore, notwithstanding explicit lease provisions to the contrary, several occupants have sublet or assigned portions of the units demised to them without the Owner's prior written consent, thereby creating new units that were not in existence at the time the leases were executed, and which have resulted in Building Code violations.

* * *

THE OWNER'S ATTEMPTS TO
IMPROVE CONDITIONS AT 640 BROADWAY

42. Contrary to the false impression created by the occupants in previous motion papers, the Owner has made substantial improvements to the building since acquiring title in 1978. In general, the building is maintained in a manner consistent with other commercial loft buildings in the neighborhood.

43. Extensive renovations and repairs were made to upgrade the building and to cure the building and fire code violations that the previous tenants had caused. For instance, a new boiler was installed in 1988 at a cost of approximately $45,000.00, which is more than adequate to meet the needs of a commercial loft building operated in a manner consistent with the requirements of the leases. In addition to general renovations in the public areas, a new front door, mail boxes,

an intercom security system were installed at the Owner's expense, although not required by the leases.

44. If the occupants find living conditions at 640 Broadway objectionable, they only have themselves to blame. There is one very obvious and simple solution, and that is for the occupants to vacate the premises in accordance with the terms of their leases, all of which (except one) have expired. This would allow the building to be returned to its only legal use as a commercial, office and light manufacturing structure.

45. In light of the foregoing undisputed facts, it is obvious that the occupants' problems are self-created. Certainly it is obvious that their persistent failure to pay rent and/or use and occupancy only exacerbate their problems. Without any income, the Owner can hardly be expected to provide even the minimum services for the operation of a commercial loft building. Without any income, the Owner is unable to pay the City real estate taxes and the building's basic operating expenses.

46. Ironically, all of the Owner's previous attempts to obtain a zoning change and building permit to convert the building to residential use from 1978 to 1982 were rejected by the City. For instance on June 19, 1980, Community Planning Board Number 2 adopted a resolution recommending that the Owner's request for a zoning variance be denied. The Community Board's decision was wholly consistent with the City's express zoning policy in 1980 to preserve large loft buildings such as 640 Broadway for commercial and light manufacturing uses.

47. In 1982 after the passage of the Loft Law, the Owner abandoned its attempt to alter the permissible use of the building because of the statute's oppressive and confiscatory provisions. Thus when the plaintiff made a good faith effort to legally convert the building to residential use, the City would

not allow it; and now that the plaintiff vehemently objects, the State and City, under the pain of non-collection of rent, and the imposition of crushing penalties, seek to force the Owner to apply for a discretionary zoning change and totally change the existing certificate of occupancy and force the unwanted conversion of 640 Broadway into a multiple dwelling. This is in direct violation of the leases, the existing certificate of occupancy and the zoning laws.

* * *

51. Among other provisions, the Loft Law established an administrative body called the Loft Board (MDL §282). The Loft Board consists of from four to nine members who purportedly represent the public, the real estate industry, loft residential tenants, and loft manufacturing interests, but in fact are all political appointees of the Mayor of the City of New York and serve at his whim and pleasure.[4]

52. Among other duties, the Loft Board is charged with the responsibility of determining which buildings are covered by the Loft Law. The Loft Board also issues regulations, *which currently exceed several hundred pages,* and further totally negate the basic rights of property owners like the plaintiff.

* * *

55. The economic impact of this scheme on an owner such as the plaintiff is devastating. Not only must an owner bear all of the economic risk throughout a conversion process which could take several years, but it is certain that the owner will not recoup any expenses for an extended period of time, and will *never* recoup *all* of the conversion costs. These statutory provisions are in direct conflict with the leases for 640 Broadway which obligate the tenants to pay for the cost of all "non-structural repairs" and all other legally required building alterations (Exhibit E, Pars. 4, 6, 39, 55, 69).

* * *

58. As originally enacted, the Loft Law contained a mechanism for exemptions from coverage for those buildings for which compliance would cause an "unjustifiable hardship" (MDL §285(2)). Hardship exemptions were purportedly available in cases where the cost of compliance rendered the residential conversion infeasible. However, those hardship provisions (which were both speculative and illusory) *lapsed* prior to the finding by the Loft Board that 640 Broadway was covered by the Loft Law (MDL §285[2]).

59. Thus, even though the residential conversion of this building will cause the plaintiff devastating economic hardship, there exists no statutory basis for avoiding compliance with the Loft Law. Moreover, it is a matter of public record that no hardship exemption has ever been granted.

60. My attorneys advise me that the Loft Law in conjunction with Article 7-B of the New York State Multiple Dwelling Law and the New York City Zoning Resolution create a statutory scheme which is both unconstitutional on its face and as applied to the plaintiff.

61. The owners of commercial buildings declared to be "interim multiple dwellings" are required to comply with the minimum housing standards set forth in Article 7-B of the Multiple Dwelling Law. Article 7-B is entitled "Joint Living-Work Quarters For Artists Or General Residential Occupancy Of Loft, Commercial Or Manufacturing Buildings [New]" *N.Y. Mult. Dwell. Law* §§275-278 (McKinney Supp. 1989). A copy of Article 7-B is annexed hereto as Exhibit B.

62. The purported public purpose of Article 7-B as stated in the legislative findings, is to enhance the cultural life of New York City and New York State by "making accommodations readily available for joint living-work quarters for artists" (MDL §275).

63. Apparently the legislature determined that because artists supposedly require large amounts of space for their work, and because the financial remunerations of artists are supposedly "small," the conversion of former manufacturing and commercial loft buildings should be *encouraged* to provide housing for artists. However, in conjunction with Article 7-C (the Loft Law) these statutes do more than merely encourage housing for artists, they mandate the conscription and the forced conversion of certain targeted buildings for that purpose without paying the Owner for the property rights that have clearly been seized.

64. Furthermore, my attorneys advise me that according to the New York City Zoning Resolution, only persons who are certified as artists by the New York City Department of Cultural Affairs could ever live in the buildings located in the zoning district in which 640 Broadway is located (Exhibit C, ZR 42-14(D) (1).

65. The end result of this statutory scheme is that the owners of these arbitrarily selected commercial loft buildings are being compelled to subsidize artists in the pursuit of their alleged artistic endeavors by the State of New York which has gratuitously turned over virtually all of the Owner's basic property rights to the illegal residential tenants. Incredibly, the whole legislative scheme is premised upon the deliberate criminal acts of these tenants.

66. Here, the plaintiff, who entered into short-term *commercial* leases with *commercial* tenants to use 640 Broadway for *commercial* purposes, now finds itself being required, at the cost of nearly Two Million Dollars, to convert the building to a multiple dwelling so that purported artists may pursue their artistic professions at subsidized rents for as long as they see fit.

67. In essence, this amounts to a "reward" to the tenants for their deliberate illegal occupation of the premises in knowing violation of the leases, the certificate of occupancy, the building code and the zoning laws. This "reward" consists of the grant of virtual life estates in the premises to the occupants, and a forcible and massive turnover of the Owner's property rights to former tenants without just compensation.

PROCEDURAL HISTORY OF THIS ACTION

68. In August of 1983, more than one year after the Loft Law as enacted, twenty-four (24) persons who claimed to be living at 640 Broadway filed an application with the Loft Board seeking a determination that twenty-one (21) units in the building were covered by the Loft Law.

69. Hearings were conducted by various hearing officers for a total of twenty-five (25) days between March and September of 1985. In opposition to the implementation of Article 7-C, the Owner raised a number of constitutional and procedural objections, including the fact that *not one* member of the Loft Board was present at those hearings to hear the testimony or observe the demeanor of the witnesses.

* * *

71. Despite the fact that the Loft Board expressly held that continued coverage of the premises was *contingent* upon the granting of a special permit by the City Planning Commission *and* the necessary artist certifications, the Owner was ordered to register the buildings as an "interim multiple dwelling" with the Loft Board. The Owner has refused to register on the grounds that mandatory registration is unconstitutional in numerous respects and because it is equivalent to the total surrender of its property rights.

* * *

79. Also, in deciding this motion, I ask the court to bear in mind the fact that it was the occupants and *not* the plaintiff who violated the building and zoning laws, and it is the occupants who still voluntarily violate those laws every night that they illegally sleep in the building. Then and now it was the occupants who, in deliberate and knowing violation of their leases, made the choice to violate numerous laws by illegally living in the units.

80. The total effect of the Loft Law is to confiscate the building from the plaintiff and to give essential long-term control of the property to the occupants, thereby rewarding them for their deliberate violations of the law and their leases.

81. Pursuant to the Loft Law, the fact that illegal residential use violates the law and the leases cannot serve as a basis for removing the illegal-use tenants, nor can the fact that the leases long ago expired (MDL §286). These restrictions demonstrate the coercive heart of the statute and its confiscatory nature.

82. Under the Loft Law, there is one and only one way that affected owners can recover any rent or the value of the use and occupancy of the units in the building. According to the Loft Law, only affected owners who are "in compliance" with the statute can recover rent. In order to be in compliance with the Loft Law, an affected owner must capitulate to the confiscatory provisions of that law. The owner must register with the Loft Board and must comply with a schedule, the end of which is the forced conversion of the building to a legal multiple dwelling at huge and uncompensated expense. And before any of the work can even begin, the plaintiff must apply for and be granted a discretionary zoning change known as a "special permit," which may never be granted, which may take years to obtain, and which is subject to the discretionary review by the Community Planning Board, the City Planning

Commission, the Office of Economic Development, and the Board of Estimate.

83. In the meanwhile, owners such as the plaintiff cannot collect rent or the value of the use and occupancy of the units in their buildings and cannot recover the units by removing the illegal ex-tenants and squatters. The Owner has not complied with the Loft Law because the law is plainly confiscatory and unconstitutional. Consistent with its position, it was required to suffer almost six years of so-called "hearings" before the Loft Board even "determined" that the law "covered" the plaintiff's building. Consistent with its position, the plaintiff has refused to register with the Loft Board because this would be a surrender of its rights and has instead brought this action.

84. By permitting the occupants to remain in long-term residential rent-free occupancy, the State has authorized the virtual seizure by the occupants of the Owner's building, and the State has affirmatively granted the former tenants legal estates in the property. The Owner never authorized, and in fact expressly prohibited residential use; the State authorized that. It was not the Owner who authorized the former tenants to remain in occupancy after the expiration of their leases; the State did that. The Owner never authorized indefinite lease renewals; the State did that. The Owner never authorized the occupants to live in the building rent free; the State did that.

85. The Loft Law, in depriving the plaintiff of the right to choose its tenants, deprives the plaintiff of the right to make private business decisions in its own best interest. For example, none of the residential occupants are today paying for the occupancy of their units. No property owner who has the ability to decide, would freely elect to rent space to tenants who have a history of non-payment of rent. In depriving the Owner of the ability to opt for a rent-paying and legal commercial tenant over an illegal residential tenant who refuses to pay rent,

the Loft Law has deprived the plaintiff of the right to make the most fundamental business decisions.

86. The right to collect rent on leased property is the most fundamental right of property ownership, without which the entire American system of real estate ownership and financing would collapse.

87. In requiring the Owner to allow the occupants whose commercial leases long ago expired to remain in occupancy, the Loft Law also deprives the Owner of the ability to ever use the building, or portions thereof, for its own business purposes.

* * *

90. More importantly, I understand that when the government authorizes a permanent physical occupation of property, there is a *per se* taking under the law. Here there is a total lack of consent or authorization by the Owner to the wholesale permanent physical invasion of 640 Broadway by the occupants for residential purposes.

91. The leases and the certificate of occupancy prohibited residential use. The Owner never consented to any extension of their tenancies beyond their lease terms. Moreover, there are several occupants — the sublettees and assignees — whose occupation of the premises was never invited for any purpose or duration.

92. Thus, the Loft Law requires the Owner to permit the permanent physical occupation of its building by third parties arbitrarily selected by the State and who now exercise their complete dominion over the property, and the Owner has no control over the timing, extent or nature of the invasion or its cost.

93. In deciding this motion, I respectfully urge this court to consider the fact that the only commodity that a property owner like the plaintiff has to sell is the use and occupancy of the space within its building. It is the plaintiff's only stock in trade. To deprive the Owner of the monetary value of the property, and all of its rights to use, possess or rent the property is to extinguish virtually all rights of ownership.

94. Besides the physical occupation of the premises by the occupants, there is another provision of the Loft Law which effects a *per se* taking. Residential tenants qualified for protection under the Loft Law, purportedly have the right to sell any improvements to the unit made or purchased by them to an incoming tenant, provided, however, that the improvements are first offered to the Owner at their fair market value (MDL §286(6)). This provision of the Loft Law extinguishes the Owner's ownership rights in those improvements as that right is expressly set forth in the leases (Exhibit E, Par. 51) and under New York common law.

95. The following items installed by the former tenants have become part of the Owner's real property: walls, partitions, electrical wiring, plumbing, flooring, built-in closets, cabinets and bookshelves. The value of these fixtures varies, but in many instances they may be are worth several thousand dollars. While it is true that under the Loft Law, the Owner retains the "right of first refusal" to purchase the fixtures, there is no justification for requiring the Owner to pay for property which under the lease and the common law, the Owner already owns.

THE LOFT LAW AND RELATED STATUTES IMPOSE AN UNFAIR BURDEN ON THE OWNER TO SUBSIDIZE ARTISTS

96. The Loft Law in conjunction with Article 7-B of the New York State Multiple Dwelling Law and the New York City Zoning Resolution create an unconstitutional statutory scheme which impose a burden on the Owner to subsidize artists.

97. Under this statutory scheme, even if a residential certificate of occupancy and a special permit were issued for 640 Broadway, *the general public* would not be permitted to live there. The only persons who could lawfully reside in this building are persons who have been deemed by the City to be "certified artists."

98. It is significant to note that artist certification is often the result of an arbitrary selection process based on nebulous subjective criteria, and many individuals with only peripheral connections to the "arts" or hobbyists, have been granted certification for the purpose of living in these highly coveted loft spaces. Moreover, the owners of the affected loft buildings are given no opportunity to object to the certification of the so-called "artists" who were illegally living in their buildings.

99. Another result of this statutory scheme is to create a special privileged class of citizens entitled to seize the property of others. In other words, a small group of arbitrarily selected real estate owners who happen to own commercial buildings which were located in certain zoning districts, and which were illegally residentially occupied during an arbitrarily selected retroactive sixteen-month period, are being compelled to subsidize that group of arbitrarily selected artists.

100. Here, the subsidy takes two forms. First, the Owner is required to rehabilitate this almost 100 year-old commercial structure at a cost of nearly Two Million Dollars in order to make it suitable for residential use. Moreover, because only certain costs can be passed on to the occupants, and even though these costs must be amortized over a ten or fifteen year period, full recoupment is unlikely. The second form of subsidy occurs because the Owner is compelled to totally renovate its existing commercial building to provide living quarters for artists indefinitely and at reduced and strictly controlled rents under the Emergency Tenant Protection Act of 1974.

* * *

102. Here the plaintiff is compelled to assume the total burden of subsidizing these artists to a greater degree than other taxpayers, based on the accident of ownership of a commercial loft building which was illegally occupied by them in violation of their leases and numerous laws, during an arbitrarily selected retroactive sixteen-month period in the early 1980's.

103. While subsidized housing for "artists", like housing for the elderly or the homeless, may be commendable government programs, it is simply unfair and unconstitutional to impose the entire economic cost of remedying such social problems on a small group of arbitrarily selected owners like the plaintiff.

THE STATUTORY SCHEME IS NOT RATIONALLY RELATED TO ITS STATED PURPOSE

104. My attorneys advise me that in order for a statute which treats citizens unequally to pass constitutional muster, it must be rationally related to a legitimate state purpose.

105. Articles 7-B and 7-C, in conjunction with the Zoning Resolution, are not rationally related to the stated

purpose of providing low-income artist with inexpensive housing and work space. Most of the persons protected by these laws are not artists, nor are they in a low-income bracket, and of those who are artists, many do not require large living/work quarters for the pursuit of their artistic endeavors.

106. Annexed hereto as Exhibit L is a recent article from the *New York Times* which noted that the median 2,000 square-foot loft price in SoHo is $535,000.00; the median 2,000 square-foot rent is $3,250.00; and the median household income is $36,400.00. *N.Y. Times*, June 12, 1988, §10, p. 11, col. 1. While the neighborhood in which 640 Broadway is located may have been pioneered by artists seeking inexpensive work space, it is now populated by chic and expensive boutiques, galleries and restaurants. Technically, only certified artists are entitled to loft spaces, but as a practical matter as the *New York Times* warned, "[o]nly rich artists need apply." *Id.*

107. Furthermore, the definition of an artist is inherently vague and overbroad. (See Exhibit B, MDL §276) For example, all fine artists such as painters and sculptors are included, even though their work may not require large loft spaces. Similarly, musicians generally do not require enormous joint living-work quarters for the pursuit of their profession. Still another example of this faulty definition, is a commercial photographer whose work might require a larger space than a miniature painter, and who might have a lower income, but is not considered an "artist" entitled to loft space under the statute.

108. Until recently there were no written rules on artist certification and the procedure has long been the subject of lore. In a recent *New York Times* article, annexed hereto as Exhibit M, Chuck Delaney, a tenant representative on the Loft Board is quoted as saying: "For 15 years, this has been part of the oral tradition. How to become a certified artist is like trying to find out how to get to heaven — you always had to take somebody's word for it." *N.Y. Times*, May 25, 1986, §8,

p.7, col. 1. In yet another article, annexed as Exhibit N, Mr. Delaney remarks on how "stories are still told in Soho of non-artists who submitted their children's finger paintings and were certified within a week." *N.Y. Times*, October 21, 1986, p. B1, col. 3.

THE STATUTE INTERFERES WITH THE OWNER'S VESTED PROPERTY RIGHTS

109. The Owner of 640 Broadway has relied in good faith on the existing zoning regulations which prohibit the residential use of this building, as well as the lawfully issued certificate of occupancy for commercial use, which dates back to 1966. This certificate of occupancy cannot be recalled, cancelled or vacated at the whim of the government.

110. The government should not be permitted to compel the plaintiff to apply for a change in the existing zoning or certificate of occupancy for this building. The plaintiff has a vested property right in the existing certificate of occupancy issued to the building and the zoning classification which permit the building to be used only for commercial and office purposes. Not only is this the only lawful use, but it is the only use that the plaintiff desires, and the only use permitted in the occupants' leases.

111. In addition to depriving the Owner of the right to decide the lawful use to which its building will be put, the Loft Law also deprives the Owner of the right to decide how it will invest its money, and forces the Owner into a new business — residential housing — at enormous and uncompensated expense. In order to bring the building into full compliance with the applicable multiple dwelling laws, the Owner will have to spend upwards of Two Million Dollars to attempt to obtain a type of zoning variance called a "special permit" it does not want; to make major structural alterations and improvement which it does not desire or need; so that the building can be

used for a purpose which is economically disastrous, currently illegal, and to which the Owner is vehemently opposed.

THE LOFT LAW OBLITERATES AND REPUDIATES ALL OF THE LEASES

112. In addition to all of the other evils wrought by the Loft Law, the statute totally repudiates the lease agreements. Under the Loft Law, the occupants can live in their units even though they were contractually bound not to do so. Under the Loft Law, the occupants have been permitted to extend the occupancy of their units endlessly; to make alterations; to subdivide units thereby creating new units; and to assign and sublet leases.

113. By depriving the plaintiff of the right to make fundamental decisions relating to the use of its property, the Loft Law treats the strictly commercial leases between the plaintiff and its former tenants as if they had never been made. Clause after clause which bans illegal residential use is cavalierly disregarded, as are provisions relating to indemnification, cost of living increases, repairs and services such as heat, elevator, rubbish removal and extermination. With a reckless disregard for the consequences, the statute shifts the economic burden from the tenant to the Owner in every instance. Instead, the Loft Law transforms the economic relationship between a commercial landlord and a commercial tenant which the parties freely entered, into one for which they never bargained.

114. By imposing a totally new economic relationship upon the parties, the Loft Law not only disregards the fact that the leases have long ago expired, but it also disregards the fact that in calculating the costs of the services which the Owner would have to provide to the tenants, the Owner never considered the possibility of having to furnish them with a totally renovated building and extensive residential services.

115. Had the occupants honored their leases by using their units for commercial purposes, and had they vacated their units when their leases expired, the plaintiff would not be faced with the problem it faces today. Had the tenants obeyed their leases and all of the City's buildings and zoning laws, there would have been no finding that the building is "covered" by the Loft Law. The tenants created this situation by their own deliberate and knowing violations.

116. Thus, the Loft Law has substantially altered the contractual relationship between the defendant-occupants and the Owner, and has superimposed additional obligations conspicuously beyond what the Owner agreed to undertake.

117. My attorneys advise me that this constitutes an unconstitutional impairment of the obligations of a private contrary in violation of Article I, §10 of the United States Constitution.

THE LOFT LAW ARBITRARILY DISCRIMINATES AGAINST SOME COMMERCIAL LOFT BUILDING OWNERS AND INFLICTS A SEVER AND INESCAPABLE PUNISHMENT UPON THEM

118. The determination of whether a building is covered by the Loft Law depends in part upon whether a residential certificate of occupancy had been issued to that building prior to the effective date of the statute (MDL §281(1)). Thus, the legislature created two classes of loft buildings, and imposed different obligations on the owners in these separate classes. It is only the owners of the applicable buildings who had not obtained residential certificates of occupancy by June 21, 1982 the date of the enactment of the Loft Law, who are compelled by the Loft Law to convert their buildings to residential use and who are thereafter subjected to rent control.

119. While the government defendants may argue that the conversion requirements are rationally related to the health and safety of the illegal residential occupants, the imposition of rent control certainly is not. Indeed, if the legislature were truly concerned with the health and safety of the loft tenants, it would have required their removal from those buildings that were not safe or suitable for residential use, rather than appeasing the tenants' demands for the permanent transfer of property rights in those buildings to them.

120. In fact, the imposition of rent control is counter-productive, because rather than provide an incentive to owners to undertake these massive rehabilitation projects, the law makes it virtually impossible for the affected owners to obtain financing for or recoup their forced investments. Clearly, by cavalierly subjecting these buildings to commercial rent control, the Loft Law goes far beyond its stated purpose.

121. My attorneys advised me that a statute which creates an impermissible classification which bears no rational relation to a legitimate government objective is violative of the equal protection clause of the Fourteenth Amendment.

122. In adopting the Loft Law, the legislature purportedly found that a "public emergency" allegedly brought on by an "acute housing shortage" justified the enactment of this law. In fact the so-called "emergency" which purportedly served as the basis for the statute would never have existed if the occupants and other similarly situated tenants had not deliberately and knowingly violated their leases as well as the zoning and building laws, by illegally residing in these commercial buildings.

123. What the Loft law did was to reward a specific and identifiable group of tenants for their wrongdoing by retroactively transferring to them a bundle of property rights, and then compelling a select group of commercial building

owners to provide lifetime subsidies to these lawbreakers in the form of costly building improvements, controlled rents, and the forced dedication of the building to the tenants' control.

124. Although the Loft Law was allegedly enacted to alleviate a housing emergency, the application of Article 7-C to the owners of buildings classified as interim multiple dwellings and not to other commercial and/or residential property owners rests on grounds wholly irrelevant to the achievement of the state's objectives.

125. Moreover, although the Owner and other commercial loft landlords subject to the Loft Law have not been convicted of any crime, these severe punishments have been inflicted upon them by the New York State Legislature in violation of the Bill of Attainder Clause of the United States Constitution.

126. The economic impact on the affected owners is devastating. This commercial building owner will be compelled to undertake renovations costing up to Two Million Dollars, and is the consigned to the arbitrary and capricious limitations on income set by the Loft Law. The building is subjected to the most strict form of rent control and is consequently drastically diminished in value, and the Owner is forever stripped of his property rights in the fixtures and numerous other basic property rights. These economic burdens are further compounded by the confiscation of the Owner's property rights to decide the lawful use to which the building will be put; to choose its tenants; and to negotiate the terms of its leases and even to collect rent for an extended period of time.

127. Not only is the punishment severe, but it is also inescapable. The Loft Law, originally contained a speculative and illusory "hardship exemption," but those provisions expired, and are no longer available to owners like the plaintiff whose buildings have recently been determined to be covered

by the law. Consequently, even though compliance with the Loft Law will cause a devastating economic hardship, there is no statutory basis for avoiding compliance. Moreover, no hardship exemption has ever been granted.

CONCLUSION

128. For all of the foregoing reasons, it is respectfully requested that this Court grant the plaintiff's motion for summary judgment on all of the constitutional claims asserted in Counts 1 through 9 of the complaint together with such other relief as to this Court seems just.

/s/ MARTIN R. FINE

Sworn to before me this
28th day of June, 1989

/s/ Eric H. Gruber
Notary Public

ERIC H. GRUBER
Notary Public, State of New York
No. 4908881
Qualified in Nassau County
Commission Expires
September 21, 1989

AFFIDAVIT IN OPPOSITION TO CROSS-MOTIONS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

640 BROADWAY RENAISSANCE COMPANY, a New York Partnership	:	AFFIDAVIT IN
Plaintiff,	:	OPPOSITION TO CROSS-
-against-	:	MOTION
MARIO CUOMO, as Governor of The State of New York,	:	

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

MARTIN R. FINE, being duly sworn, deposes and says:

* * *

INTRODUCTION

2. The affidavits of the City-defendants are permeated with buzzwords such as "legitimate governmental concerns," "a fair and balanced framework," "reasonable state legislation," "pioneering loft tenants," "complex matrix of inequities," in support of the Loft Law and the other related statutes challenged in this lawsuit. According to the defendants, in order to "balance the equities," the government was required to develop a "complex, comprehensive six-part plan." (Fredericks Aff., ¶¶ 7, 14; Fawkes Aff., ¶¶ 5, 6, 8).

3. In fact, this is just more government "gobble-dygook" used to distract this Court's attention from what are clear and indisputable violations of the basic constitutional rights of the owners of the affected buildings. What the Loft Law[1] is really about is the redistribution of wealth. The Loft Law, in Robin-Hood fashion, authorizes the taking from the owner and the giving to the law-breaking tenant of all the fundamental rights of real estate ownership. In the arrogant, skewed and prejudiced view of the defendants, once the property has been taken from the owners and given to the "pioneering loft tenants," the equities will then become "balanced."

4. Lurking in the background of the defendants' justification for the Loft Law is their utter and complete failure to answer one very critical question, viz: "why was it necessary for the Loft Law to be compulsory?" In failing to address this question, the defendants fail to confront the fact that the Loft Law truly is a vast abuse of government power.

5. By their own admission, the defendants acknowledge that at one time the laws which existed in the City and the State made it difficult, if not impossible, for the owners of loft buildings (such as the plaintiff's buildings) to voluntarily convert such commercially-zoned buildings to residential use. At the same time, it is acknowledged that the City's official policy was, and continues to be, to discourage the conversion of commercial loft buildings to residential use.

6. The plaintiff's experience is a perfect example. As discussed in further detail later in this affidavit, the plaintiff's attempt to convert this building to residential use in the late

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[1] "Loft Law" includes other related laws in the Multiple Dwelling Law and the Real Property Actions and Proceedings Law.

1970's and early 1980's was met with hostility and rejection by all of the government agencies involved.

7. Rather than change the law so as to encourage the *permissive* conversion of loft buildings, instead the City and the State adopted a program which made such conversions *compulsory and confiscatory*. The compulsion includes the fact that if an owner does not convert, he cannot remove the illegal residential tenants from possession, and for as long as the illegal conditions created by the tenants' occupancy exist, the owner cannot collect rent and, without rent, will lose the building by City confiscation.

8. So, while the defendants may talk about "complex, comprehensive, six-part plans," at no time do they ever grapple with the main constitutional issue, which is why that so-called "plan" had to be compulsory as far as the owners were concerned, and totally discretionary and non-binding on the tenants, who continue to be free to vacate the premises whenever they so desire.

9. In their affidavits, the government-defendants also overlook other very notable points. All of the affidavits which I have presented to this court prove that the so-called "emergency" upon which the Loft Law was based, was really a hoax.

10. Any claimed "emergency" which may have existed, was totally self-created by the loft tenants' utter disregard for the clear provisions of law and their leases. In the plaintiff's case, the residential use of the lofts was prohibited both by zoning, fire, safety and building laws. In disobeying these laws and in dishonoring their leases, the tenants created any "emergency" which may have existed. The truth of the matter is that the only "emergency" was that the tenants' leases had expired by their own terms, which the tenants did not like.

11. Given the propensity of the tenants to violate the law and to dishonor their leases which forbade residential use, and given the official policy of the City and State to discourage the conversion of loft buildings to residential use, landlords found themselves with their hands tied.

12. If there was any "emergency," it was caused by the deliberate and illegal acts of the very same tenants who now claim lifetime residential estates in the plaintiff's commercial building based solely upon their illegal use and occupation under a short-term commercial lease.

13. But even if there was an "emergency," it is clear that it was not so wide-spread so as to constitute a "public" problem. Rather, the Loft Law represented an attempt by government to reward, for political reasons, an arbitrarily and pre-selected group of tenants for their own illegal activities.

14. That the purported emergency was not widespread, is evidenced by Paragraph 18 of the affidavit of Lee Fawkes in which he admits that since 1982, only 120 buildings have fully complied with the Loft Law, while another 290 have begun the legalization process. Moreover, a recent article in the *New York Law Journal* reported that there are nearly 650 loft buildings in New York City which are not in compliance with the Loft Law. Anderson, *Loft Landlords Limited on Suits for Back Rent,* N.Y.L.J., July 10, 1989, p. 1, col. 3. A copy of this article is annexed hereto as Exhibit "A." Thus, it appears that a total of only approximately 1,000 buildings are affected by the Loft Law out of the hundreds of thousands of buildings located in New York City.

15. Neither can it be disputed that the "covered" tenants were pre-selected for coverage. Despite the fact that the Loft Law took effect on June 21, 1982, it applied only to tenants who had been in residential occupancy during the period of April 1, 1980 through December 1, 1981. Hence, to be

covered, a tenant had to be in residential occupancy continually for a period of twenty-six (26) months *prior to* the enactment of the Loft Law. Thus, the Loft Law was purely retroactive and did not purport to cover any future occupancies.

16. That these arbitrarily-selected "covered" tenants were known in advance to City and State officials is evidenced by Paragraph 17 of Lee Fawkes' affidavit in which he states:

> "Beginning in 1982 . . . the [Loft] Board staff mailed registration forms to the owners of buildings which the City had reason to believe would qualify as IMD's and should therefore register with the Loft Board."

17. Thus even before the Loft Law was enacted, the City knew the addresses of the affected buildings and the names of most, if not all, of the tenants who would be affected. Therefore, by definition, this was special interest legislation.

18. Furthermore, lists of buildings and affected tenants were compiled by an organization of loft tenants known as the Lower Manhattan Loft Tenants Association. This list was made available to the City and State government, who worked in conjunction with the Manhattan Loft Tenants Association to prepare the legislation which was ultimately adopted by the State Legislature.

19. The reality is that far from constituting an exercise of the police power for the good of the general public, the Loft Law constituted a compulsory transfer of property rights from the owners of 1,000 buildings to a small group of tenants who had been pre-selected by the City and State governments to receive the benefits and rewards which the Loft Law showered down upon them, purely to appease the political demands of the Lower Manhattan Loft Tenants Association. In fact, the President of the Lower Manhattan Loft Tenants Association, Chuck Delaney, himself a loft tenant and a principal draftsman

of the Loft Law, was immediately appointed as a member of the Loft Board.

* * *

25. Under the provisions of the Loft Law, the owner's knowledge, permission or consent to the illegal residential occupancy *is irrelevant*. Such factors have absolutely nothing to do with the question of whether a particular building is "covered" by the Loft Law.

26. Section 281 of the *Multiple Dwelling Law* sets forth the criteria for determining whether a building is covered by the Loft Law. Factors such as the knowledge, permission, consent or encouragement of the owner *are not included*.

27. Under the Loft Law, the proverbial "little old lady" sitting in a rocking chair in a nursing home in Arizona who did not know that her tenant called "Acme Tool & Die Company" was really a couple of upper-middle class professionals who were living in a loft in her building, is just as "covered" by the Loft Law as is the most scheming and conniving of owners.

28. Moreover, the occupants of 640 Broadway are not the poor, struggling artists that the statute was supposedly enacted to protect. Nor is this a class of underprivileged or naive individuals like the elderly or the homeless who are in need of government protection. Most of the occupants of 640 Broadway are college-educated and the children of wealthy parents, who came to New York City in search of a Bohemian lifestyle.

29. A perfect example of the perverse manner in which the Loft Law operates is Phoebe Rentschler. The Loft Board determined on April 28, 1988 that Ms. Rentschler is a residential tenant of unit 9E and as such she is entitled to the protection of Loft Law, despite the fact that she is no an artist, is listed in the Social Register, and is now married and not even

living in this building! In fact, Ms. Rentschler, now Mrs. Charles Cole, was served with the summons and complaint in this action on November 9, 1988 at her new address on the Upper East Side of Manhattan.

* * *

31. The second reason why the Loft Board opinion is irrelevant is legal in nature, and is addressed more fully in the plaintiff's memorandum of law which accompanies this affidavit.

32. Essentially, an order or judgment rendered by a court or an administrative body is not conclusive with regard to a question which, from the nature of the case, may not be adjudicated in the action in which it is rendered. If a judgment purports to adjudicate matters not raised by the pleadings, not in issue between the parties, and which are not "material" to the controversy, that part of the judgment is not conclusive upon such matters in subsequent proceedings.

33. Since the question of an owner's knowledge, permission, consent or encouragement is irrelevant to the question of coverage under the Loft Law, it therefore follows that the statements which are contained in the Loft Board opinion regarding knowledge, permission, consent or encouragement must be considered to be gratuitous *dicta* which is not binding in subsequent proceedings.

34. The powers of the Loft Board are limited to those enumerated in Section 282 of the *Multiple Dwelling Law*. While the Loft Board is empowered to decide issues relating to "the determination of interim multiple dwelling status and other issues of coverage pursuant to this Article, " nowhere is the Loft Board empowered to decide issues which are irrelevant to interim multiple dwelling status and other issues of coverage.

35. Because the issues of knowledge, permission, consent or encouragement are irrelevant to coverage, and because the Loft Board is not empowered to decide such extraneous issues, it therefore follows that the statements in the Loft Board opinion which have nothing at all to do with Loft Law coverage have no estoppel effect in this, or any other lawsuit.

36. It is a matter of public record that the Loft Board consists of a group of persons appointed by the Mayor of the City of New York, who serve at his whim and will. These politically-connected hacks do not represent the interests of property owners. To the contrary, the Loft Board has proven itself to be nothing more than a group of puppets whose strings are pulled by pro-tenant political interests in the City of New York.

37. On the *nine* (9) members on the Loft Board, only *one* (1) purportedly represents the real estate industry. Hence, persons such as labor leaders and loft tenants have been delegated the majority power to totally control the plaintiff's building. These individuals have been given the power to dictate allowable rents, the duration of the leases, and the services that must be provided. In enacting the Loft Law, the State took away from the property owners the right to make these fundamental business decisions, and gave the right to persons having no economic interest in the building. Clearly, such a vast delegation of virtually all of the property owner's rights to an anti-owner political group constitutes a seizure in its most classic constitutional sense.

38. In reality, the deck was stacked against the plaintiff the day the Loft Board hearings began. As is virtually the case with every decision it makes, the Loft Board, by a vote of eight to one, ruled against the owner. The Owner never expected the Loft Board to do anything, other than issue such a one-sided,

biased opinion designed to help the tenants and hurt the plaintiff.

39. For the reasons stated above, any statements contained in the Loft Board opinion other than the statements relevant to Loft Law coverage, should be disregarded by this Court.

PLAINTIFF'S KNOWLEDGE OF THE ILLEGAL RESIDENTIAL USE

40. Defendants somehow contend that because the plaintiff learned that its tenants, in violation of law and lease, were living in their lofts, the plaintiff now has only itself to blame for its current problems.

41. The plaintiff has not denied that it became aware of the criminal activities of its tenants. The plaintiff has known for many years that many tenants were violating the law and their leases by living in their units. However, the plaintiff was powerless to stop these violations. The plaintiff did not violate the law by living in the building; the tenants did. As of this very moment, residential use by the present occupants is in clear violation of the Building Code and the New York City Zoning Resolution, but the City-defendants refuse to enforce those laws.

42. In order to make clear that at no time was the plaintiff responsible for the illegal residential conversion of 640 Broadway, the following background information is provided.

43. At the time the plaintiff took title to the building in March of 1978, the building was virtually vacant except for a handful of tenants who were engaged in commercial or light manufacturing enterprises. While there had been illegal

residential use prior to the plaintiff's purchase of the building, in fact, the plaintiff eliminated such use by removing all the residential tenants after the plaintiff took title.[2]

44. At no time did the Owner ever lease any portion of this building for residential purposes. Each lease specifically provided that the premises were to be used solely for commercial, office or manufacturing purposes and that in no event could the units be used as residences.

45. In each instance, the lease was the product of an arms-length transaction with a well-educated, sophisticated adult who either was represented by, or had access to any attorney. In each instance, the premises were vacant, the occupant who executed the lease had a residence elsewhere and expressly represented to the Owner that the unit would not be used as a residence. The occupants further represented that they knew it was illegal to reside in the building; that they would comply with all laws relating to the use of the premises; and that they would indemnify the Owner and hold it harmless from any claims, penalties, loss, damage or expense, including attorneys fees, incurred because of their illegal use of the premises.

46. The plaintiff had good reason to insist upon each occupant's specific written promise that the unit would not be used as a residence. It is a well-known fact that in the late 1970's it became quite chic to live in commercial loft buildings in lower Manhattan. It was to protect the plaintiff from those adventurous individuals who were willing to flout the building

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[2] The one exception was Joel Hinman, who executed a new lease and assured the Owner that he would discontinue the illegal use of his unit 5W as a residence, and henceforth use it solely for bona-fide commercial purposes.

code and applicable zoning laws, that *this building owner* insisted upon specific written assurances from all prospective tenants that they would use their units solely for commercial purposes, and would indemnify the plaintiff against all damages resulting from any illegal use. *Moreover, their leases specifically required the tenants to pay for the cost of any subsequently required building improvements or changes.*

47. Had the prospective tenants not made those specific written representations, the plaintiff never would have entered into any lease agreements with them.

48. For their own self-serving reasons, the defendants now contend that because the tenants, who the plaintiff tried to prevent from living in their lofts, chose to disregard their leases, as well as all applicable laws, the plaintiff somehow abandoned its constitutionally protected rights, for no reason other than that the plaintiff became aware of the illegal conduct of the tenants.

49. The first deficiency in the defendants' argument is that just because the plaintiff became aware that the tenants had freely and voluntarily elected to flout the law by illegally living in their units, did not make such acts lawful.

50. The second deficiency in the defendants' analysis is that just because the plaintiff became aware that the tenants had freely and voluntarily elected to flout the law by illegally living in their units, did not make the leases any less enforceable than they were on the day that the tenants agreed to abide by the terms, covenants and conditions contained in those leases, which leases all contain "no waiver" and "no oral modification" clauses.

51. The most frightening deficiency inherent in the defendants' argument is that because the plaintiff became aware of the tenants' contemptuous disregard for law and lease, that in some perverse way, gave the state the right to seize the

plaintiff's property and to transfer it to the tenants. Apparently, the unspoken sentiment is that because the tenants violated the law and breached their leases, it is the plaintiff who should be punished, not because the plaintiff was the wrongdoer, but rather because it became aware of the wrongdoing

52. The attitude manifested by the defendants exemplifies what the plaintiff claims is fundamentally wrong with the Loft Law. Their entire argument is build upon a disregard of the fact, which is basic to the Loft Law, that loft tenants committed deliberate criminal acts by living in their units, and that as a result, it is the owner who is being punished by the confiscation and conscription of his building.

53. This is a classical example of a Bill of Attainder. Through no fault of its own, the plaintiff is being punished by an act of the legislature, without any trial for the deliberate wrongdoing of its tenants. Despite what the Governor-defendant says in his memorandum of law — that statutes have rarely been invalidated on this ground — does not mean that this Constitutional provision has any less force or effect than it did when it was inserted into the Constitution by the founding Fathers.

54. Apparently, the defendants do not realize that there is a great difference between legal and illegal residential use. While they apparently do not care a whit for the explicit prohibitions of residential use which are contained in the leases, the act of the matter is that those prohibitions were and are there, not only to discourage, but to prevent illegal residential use. While it is true that the plaintiff unsuccessfully sought a zoning variance to permit residential use in the manner which is discussed below, surely to seek to abide by the law cannot legally serve, as defendants suggest, as an encouragement to the tenants to violate the law.

55. The fact of the matter is that the plaintiff, when confronted with the gross disregard for law and lease which was exhibited by its newly—enshrined tenants, acted in a manner which was as reasonable, responsible and as lawful as can be imagined under the circumstances.

56. When confronted with the illegality which had been foisted upon it by these tenants, the plaintiff sought to remedy the tenants' illegal occupancy. Accordingly, the plaintiff filed an application with the New York City Department of Buildings to make certain alterations to the building which would have made it legal for limited residential use if it had been granted. Although the New York City Zoning Resolution prohibits residential use in this size building in this zoning district, and although it was certain that the application would be denied by the Building Department, such formal denial was a legal prerequisite to the filing of an application for a zoning variance with the Board of Standards and Appeals.

57. The alteration application was denied by the Building Department, and the plaintiff then filed an application for a zoning variance by appealing the denial to the New York City Board of Standards and Appeals. As was required by the procedures which existed at the time, the application had to be reviewed by the Community Planning Board which had jurisdiction over the area in which the building was located.

58. Upon reviewing the application for a zoning variance, *Community Board Number 2 officially resolved to oppose the application for a zoning variance in order to support the City's policy of maintaining manufacturing districts.* Notably, in its resolution, dated *June 19, 1980*, the Board stated that it is illegal to use any portion of the building as a residence and that "there are outstanding *commercial* leases on many of the floors which run for three to four more years." (Emphasis supplied.)

59. The commercial leases to which the Community Board referred, were the now-expired leases of "covered" tenants who were formerly defendants in this action. One of the very reasons why the zoning change application was denied was because of the existence of these very same *commercial* leases.

60. The action of the Community Board in opposing the application for a variance was wholly consistent with the policy of the City with respect to large loft buildings. The larger loft buildings, of which 640 Broadway is one, are uniquely suited for commercial use. It was and is the policy of the City to retain the use of the larger buildings for commercial activities *and this building is still zoned only for manufacturing and commercial use.*

61. First, the City defendants argue that residential use at 640 Broadway is legal, then, in Paragraph 19 of the affidavit of Lee Fawkes they contradict themselves when they admit that "the subject building may be used for joint-living-work quarters for artists *if a special permit for such use is granted by the City Planning Commission.*" (Emphasis added.)

62. What Mr. Fawkes fails to mention is that residential use is lawful *only if* a special permit is granted, and that *until* a special permit is granted, residential use is totally illegal, and all of the defendants' bluster cannot change this basic fact.

63. Shortly after the action of Community Board Number 2 in 1980, the procedures by which an owner, such as the plaintiff, obtained authorization to use a building as a multiple dwelling were changed. Instead of having to apply for a zoning variance, the owner was obligated to obtain a "special permit," a change which was non-substantive in nature. Procedurally, the special permit is obtained from the City Planning commission, the members of which are also

appointed by the Mayor, the same person who appoints the members of the Loft Board.

64. After the change in the procedure which I have just described, the Board of Standards and Appeals refused to hear any of the pending applications for zoning changes, one of which was plaintiff's. Since the Loft Law excepted from coverage those buildings for which a residential certificate of occupancy had already been issued, the timely granting of plaintiff's application would have meant that it would not today be covered by the Loft Law. Therefore, when the plaintiff wanted to convert the building to a multiple dwelling, the City would not allow it, and now that the plaintiff objects, the City, under pain of non-collection of rent, and under threat of the forced seizure of its building, seeks to compel it to do so.

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66. In 1980, two years before the enactment of the Loft Law, the City adopted the Relocation Incentive Program which *required* owners of loft buildings in certain areas of the City who *wanted* to convert their buildings to multiple dwellings to pay a substantial "conversion contribution" before they could obtain an alteration permit. In the case of 640 Broadway, this "contribution" would initially have amounted to $440,000.00. (Originally the "conversion contribution" was $4.50 *per square foot*, but it was raised to $9.00, the then to $11.00 per square foot.) Buildings required to pay the "conversion contribution" were called "applicable buildings." In order to be an applicable building, space in the building must have been used for certain industrial purposes on August 31, 1980, or if vacant on that date, used for industrial purposes within three (3) years of that date. This included virtually every old commercial building in downtown Manhattan, including 640 Broadway.

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68. With the enactment of the Loft Law in 1982, which *mandated* involuntary residential conversions, the very real possibility existed that the owners of loft buildings would have to pay *both* the costs of converting the building to a multiple dwelling, and the "contribution" to the relocation program.[3] To qualify for an exemption, an application had to be filed with the Board of Standards and Appeals by September 1, 1983, so on January 4, 1983, the plaintiff filed an application in order to avoid having to pay this so-called "contribution." It was *not* a change of use or zoning change application, and after the Loft Law was enacted, the plaintiff never filed any further variance of use or zoning change applications.

69. Annexed to that alteration application was a Building Department order which stated that 640 Broadway was an "applicable building," and that the plaintiff would have to make the "conversion contribution." *Thus, the alteration application was filed by the Owner for the sole purpose of avoiding the mandatory conversion contribution to the New York City Business Relocation Assistance Corporation.* A copy of the Building Department order is annexed hereto as Exhibit "B."

70. Notably, in the prior year, the plaintiff filed a required "preliminary application" under protest in which the Owner stated in part:

> "With respect to these premises, Sec. 15 of the Zoning Resolution as it appears to require 'conversion contributions' of $9.00 per square foot

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[3] In order to avoid this double confiscation, the Loft Law was amended in 1987 to provide that buildings subject to the Loft Law would be exempt from paying any "conversion contributions." MDL §285(3).

> to be paid to the City is illegal and unconstitutional. By the execution of these documents, the undersigned in no way waives its rights to protest or seek judicial relief, or commence or maintain any other legal proceedings to declare that said extortionate fee being claimed by the City is illegal and unconstitutional and owner reserves all rights with respect thereto."

71. Thereafter, in *August of 1983*, the occupants of 640 Broadway filed their "coverage" application with the Loft Board. Almost five years later, on *April 28, 1988*, that application was granted, when twenty (20) units were found to be "covered" by the Loft Law. Despite of the the fact that the plaintiff only rented seventeen (17) units, twenty (20) were found to be covered by the Loft Law. The additional three (3) units came into existence in violation of the Building Code and the leases when the tenants "subdivided" units without the plaintiff's consent.

72. Based upon the foregoing facts, it would be clear that the plaintiff did what it could to prevent its tenants from illegally converting their commercial units into living quarters in total disregard of the provisions of their leases, the building's certificate of occupancy and the applicable laws.

73. Confronted with the tenants' illegal acts, the plaintiff made a legitimate business decision and tried to obtain a variance to remedy the unlawful conditions which had been created by the tenants. Because City policy opposed such conversions, the plaintiff failed in its attempts.

74. Thereafter, solely in order to avoid the impact of various confiscatory laws, the plaintiff filed these applications, all under protest and without waiving any rights.

75. For the defendants to now suggest that it was the plaintiff who "repudiated" the leases or that it was the plaintiff who encouraged the residential conversion of 640 Broadway is

a perversion of reality and is belied by all of the facts and documentary evidence set forth herein.

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85. As originally enacted, the Loft Law contained a mechanism for exemption from coverage for those buildings for which compliance would cause an "unjustifiable hardship" (MDL §285(2)). However, the owners of buildings subject to the law were required to submit hardship applications to the Loft Board within nine (9) months of the establishment of the Loft Board. The City-defendants claim that the Loft Board notified the owners of buildings which "appeared to be subject to Article 7-C" of the June 30, 1983 deadline for hardship applications. (City Mem. Law, pp. 31-32).

86. However, they conveniently neglect to mention that as of June 30, 1983: (a) 640 Broadway had not been designated for coverage; (b) no application for coverage had even been filed by the tenants; and (c) for the first several years after the enactment of the Loft Law, there were *no regulations, no guidelines* and *no definitions* of what would constitute a "hardship" under the law. Moreover, there were *no applications, no procedures* and *no hearings* which would have made such an exemption possible. This fact is documented by the *Spring Realty* opinion in which the New York Supreme Court Justice McCooe proclaimed that there was no legitimate reason for the Loft Board's failure after three (3) years to promulgate any hardship regulations. *Spring Realty Co.*, 487 N.Y.S.2d at 978 (Exhibit E).

87. Furthermore, once the regulations were pro promulgated, the exemption was tied to a "reasonable rate of return on the Owner's investment," which was defined as a net annual return of only five percent (5%). *No provision was made for any return on the owner's capital investment.* In other words, the owner was converted to a poorly-paid managing

agent. In essence, the Loft Law transformed the owners' commercial property into a regulated public utility without compensation, but notably, even those Entities are entitled to an eleven percent (11%) to fourteen percent (14%) return on *invested capital.*

88. Even more ludicrous was the legal requirement that the owners submit *sworn affidavits* speculating on the total cost of the building renovations and the other costs of compliance (*e.g.*, the cost of obtaining a zoning variance), as well as projecting the operating income and expenses *after* the conversion was complete. Obviously, compliance was impossible because all of these numbers were unknown. A copy of these so-called "hardship" regulations is annexed hereto as Exhibit "I."

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95. Evidently, the defendants are contending that because the Loft Law does not unconstitutionally infringe upon one contract, it cannot unconstitutionally infringe upon any other contract, notwithstanding the factual setting, or the terms, covenants or conditions of those other contracts. No authority is given for that remarkable proposition.

***

101. Paragraphs 39 and 40 of the leases served a different purpose. Those paragraphs provided that if a tenant used a unit for a purpose which violated the law or which violated his or her lease, the tenant would indemnify plaintiff and hold it harmless from any claims, penalties, loss, damage or expense, including attorneys' fees.

102. In making the leases, the plaintiff never agreed to accept the tenants as anything other than commercial tenants. They were never accepted as residential tenants. Plaintiff prohibited them from being residential tenants. The plaintiff

never agreed to provide the sort of services which would have to be provided to residential tenants. In determining the rent, which was freely negotiated, the plaintiff did not factor in the cost of providing residential services because the leases were commercial, not residential in nature. Neither did the rents reflect the enormous costs that would be involved in converting the building into a legal multiple dwelling, if that was even legally or structurally possible.

103. The standard leases at 640 Broadway were commercial in nature and were not residential for the following reasons:

a. Paragraph 4 required the *tenant* to make all non-structural repairs at *tenant's* sole cost and expense.

b. Paragraph 29 required the *tenant* to pay the costs of installing a sprinkler system if same became necessary, and to do everything else to comply with all applicable laws, building codes and regulations [also ¶ 6].

c. Paragraph 30 required the landlord to provide heat only on business days from 8:00 a.m. until 6:00 p.m. and on Saturdays from 8:00 a.m. to 1:00 p.m. The landlord *was not required to furnish heat in the evening, on Saturdays after 1:00 p.m. or on Sundays.*

***

g. Pursuant to Paragraph 41 the *tenant* was obligated to "replace all damaged or broken plate glass or other glass in or about the demised premises."

h. Pursuant to Paragraph 42 the *tenant* "at its sole cost and expense shall be solely responsible for and pay for all utilities and/or services used and required by tenant, including electricity and gas and water."

i. Pursuant to Paragraph 54 the landlord was entitled to periodic rent increases based upon increases in the Consumer Price Index.

j. Pursuant to Paragraph 66 the tenant "shall require all its contractors, plumbers and electricians to supply to the landlord a certificate of insurance naming the landlord as an additional insured prior to the commencement of any work by said contractor, plumber or electrician."

k. Paragraph 72 provides that the tenant agrees "to accept the demised premises 'as is' in its condition as of the date" of the lease.

* * *

104. The foregoing are the sorts of provisions found only in commercial leases. For the defendants to now contend that the occupants of 640 Broadway possess the lifetime rights of residential tenants, is to make a mockery of the leases and to totally destroy the plaintiff's property rights. In effect, they argue that it does not matter what the leases said. If the tenants want to violate the leases and numerous civil and criminal laws by living in their units, and if the government wants to step in and give its legal "stamp of approval" to such violations and grant lifetime estates to a retroactively selected group of individuals, arbitrarily defined, the landlord is powerless to object, or so the defendants would have this court believe.

105. An examination of the various court decisions, briefs and jurisdictionally statement in the *Spring Realty* case, shows that these contract provisions were not before the court in that case and accordingly, there is no reason to prevent this Court from deciding the very specific contract impairment claims which the plaintiff raises. Furthermore, no determination had been made in *Spring Realty Co.* that the buildings were covered by the Loft Law and therefore that case is irrelevant.

THE PLAINTIFF HAS A VESTED RIGHT TO CONTINUE TO USE THE BUILDING FOR COMMERCIAL PURPOSES

106. At the time the plaintiff purchased 640 Broadway in 1978, the only lawful uses to which the building could be put were commercial and manufacturing. The certificate of occupancy, which was issued on May 17, 1966, states that this is a commercial building and that its only permissible use is for stores on the street level, and offices and manufacturing on the remaining eight (8) floors. *In fact, the building has been used exclusively for commercial purposes since it was constructed in 1895.* A copy of the certificate of occupancy is annexed hereto as Exhibit "K."

107. As the accompanying memorandum of law establishes, the plaintiff has acquired a vested right to continue to use the building for commercial and manufacturing purposes. The plaintiff cannot be constitutionally deprived of the right to continue to use the building for those purposes because of a law which was enacted *four (4) years* after plaintiff took title, and *sixteen (16) years* after the certificate of occupancy was issued.

108. As the record before this Court shows, various City agencies knew that 640 Broadway was a commercial building with commercial tenants when, shortly prior to the enactment of the Loft Law, they refused to allow the plaintiff to obtain a zoning variance to convert the building to residential use. Furthermore, the City has never changed the manufacturing and commerical classification of this building or this zoning district.

109. Because of the foregoing, state law recognizes that plaintiff has a vested property right in the existing certificate of occupancy, which right cannot be constitutionally taken from the plaintiff without the payment of just compensation. Moreover, the City an the State have no power or authority to

require property owners to apply for a zoning variance against their will. Because the Loft Law does precisely that, it is unconstitutional.

* * *

118. Another important development since the instant motion for summary judgment was served, is the decision rendered by the New York Court of Appeals in *Seawall Associates, et al.* v. *The City of New York*, 74 N.Y.2d 92, 544 N.Y.S.2d 542 (1989) on July 6, 1989. A copy of the *Seawall Associates* decision is annexed hereto as Exhibit "N" for this Court's convenience.

* * *

123. Both laws result in the "forced occupation" by strangers of private property. Both laws compel the affected building owners to subject their property to a use which was neither planned nor desired. Both laws deprive the owners of the rights to use, possess and dispose of their property, as well as the right to exclude others. These are the most valuable components of what is commonly referred to as the "bundle of rights," which make up the fee interest in real property.

124. Another significant legal development that I would like to call to this Court's attention is the decision by the Appellate Term, First Department in *902 Associates Ltd.* v. *Total Creative Services Inc.*, N.Y.L.J., July 10, 1989, p. 29, col. 4. A copy of this decision is annexed hereto as Exhibit "O."

125. The issue in *902 Associates Ltd.*, was whether full compliance with the legalization timetable set forth in MDL §284(1) was required in order for the owner of a loft building to maintain an action for non-payment of rent. The Appellate Term held that the mere registration of the building as an interim multiple dwelling was not sufficient, and the statute as

enacted by the Legislature, required full compliance with the conversion schedule.

126. Since nearly 650 loft buildings in New York City are not in compliance with the Loft Law, the Appellate Term's decision annihilates the rent roll in all of these buildings. Moreover, as Justice Ostrau observed in his dissent, the majority's holding "raises the specter of bankruptcy for most interim multiple dwellings."

* * *

129. The application for a special permit is a lengthy and cumbersome process which requires the *discretionary* approval of several independent New York City agencies, including the City Planning Commission and the Board of Estimate. Although there is absolutely no guarantee that a special permit will ever be granted, an applicant is first forced to expend tens of thousands of dollars on engineers, architects and lawyers during this approval process. Since the Owner does not want to convert this building to residential use or change its existing certificate of occupancy, there is no special permit application pending for 640 Broadway, despite the mandatory requirement of the Loft Law to the contrary.

130. In addition, the City-defendants repeatedly state that the owners of interim multiple dwellings are "merely" expected to comply with "minimal housing standards." It seems naive in the extreme to consider "minimal," the mandatory and undisputed investment of Two Million Dollars which would be necessary to convert this 100-year-old commercial structure into a multiple dwelling.

131. Finally, in response to the City-defendants argument that the plaintiff's claim is premature (Fredericks Aff., §10), annexed hereto as Exhibit "P," are three (3) violation notices which have already been served on the plaintiff for its failure to comply with the Loft Law. Although

these purported violations have since been corrected, the threat of future enforcement proceedings and harsh penalties is continuous and very real.

132. Clearly, the economic injury that is central to any ripeness inquiry is present in this case. The seizure of the building by the tenants is compounded by their persistent failure over the last several years to pay any rent or use and occupancy in reliance upon the Loft Law. At the present time, the Owner is owed rent, rent increases and use and occupancy in excess of $600,000.00.

133. There is nothing "abstract" about the uninvited physical occupation of the plaintiff's property by the present occupants. There is nothing "hypothetical" about the residential use of the premises in contravention of the commercial leases, the building's certificate of occupancy, the building code and local zoning laws. There is nothing more "concrete" than the illegal sublets, assignments and subdivisions that have taken place in some of the units without the Owner's consent, or the non-payment of rent over the past several years.

134. In conclusion, the plaintiff has already suffered severe economic injury; the threat of even greater future harm is imminent, the Loft Board's determination of coverage is final; the cost of compliance is exhorbitant; and the impossible to comply with "application" for a "hardship" exemption, previously illusory if not futile, is absolutely precluded by the expiration of such exemptions. It is therefore difficult to imagine a legal controversy which is more "ripe" for immediate judicial review. Furthermore, this case raises substantial federal questions which should be decided on the merits.

WHEREFORE, the plaintiff respectfully prays that its motion for summary judgment be granted, that the defendants'

cross-motions be denied, and for such other relief which this court feels is just.

/s/ Martin R. Fine
MARTIN R. FINE

Sworn to before me this
8th day of November, 1989

/s/ Kenneth G. Schwarz
Notary Public

KENNETH G. SCHWARZ
Notary Public, State of New York
No. 03-8880735
Qualified in Westchester County
Commission Expires
October 31, 1990.

COUNTY DOLLAR CORPORATION,
Petitioner-Landlord-Appellant,

v.

Elise DOUGLAS et al.,
Respondents-Tenants-Respondents.

Supreme Court, Appellate Division,
First Department.

April 19, 1990.

* * *

Before KUPFERMAN, J.P., and ROSS, ROSENBERGER and WALLACH, JJ.

MEMORANDUM DECISION.

Order, Appellate Term, First Department (Stanley S. Ostrau, P.J., Stanley Parness, Edith Miller, JJ), entered July 18, 1989, which affirmed an Order, Civil Court, New York County (Bruce J. Gould, J.) entered May 18, 1988, unanimously affirmed, without costs.

Petitioner, owner of an interim multiple dwelling, commenced non-payment proceedings against loft tenants. The Civil Court dismissed the petitions at the close of petitioner's case for failure to comply with an owner's obligation pursuant to MDL § 284(1)(i). Petitioner appealed and the Appellate Term affirmed on the basis of the majority opinion in *902 Assoc. v. Total Picture Creative Services*, 144 Misc.2d 316, 547 N.Y.S.2d 978 (Ostrau, P.J., dissenting). We agree.

[1,2] Article 7-C of the Multiple Dwelling Law (the "Loft Law") balances the interests of loft tenants and owners. While the statute allows owners to collect rent despite the lack of an appropriate certificate of occupancy, it specifically conditions that relief upon compliance by the owner with the

Loft Law (MDL § 285). The statute sets forth such obligations to legalize a covered loft building (MDL § 284). Petitioner contends that a non-payment proceeding may be maintained upon a showing of compliance with the registration requirement (MDL § 284[2]) and a reasonable attempt to comply with the four step legalization procedure of MDL § 284(1)(i). An attempt is insufficient, although we are informed that subsequent to the non-jury trial, additional actions were taken by the petitioner-landlord which could establish compliance, and we do not foreclose a further proceeding to so establish. An owner must prove compliance with legalization requirements in order to maintain a non-payment proceeding (*Lower Manhattan Loft Tenants v. New York City Loft Board*, NYLJ, August 15, 1984, p. 11, col. 1 [Sup.Ct., NY Co.]; *Cobra Resources, Inc. v. Dumpl, Inc.*, 138 Misc.2d 91, 522 N.Y.S.2d 433; *Greeting Card Publishers, Inc. v. Spencer*, 141 Misc.2d 800, 534 N.Y.S.2d 636; *902 Associates Ltd. v. Total Picture Creative Services, Inc., supra.*) Strict adherence is necessary to satisfy the public policy considerations recognized by the Legislature to protect the life, health and safety of tenants and the integrity of zoning regulations. Although the statute also contains provisions for exemption of owners due to financial hardship (MDL § 285[2]), petitioner never made a hardship application.

[3] Nor is a finding of non-compliance by the Loft Board a prerequisite to a determination of non-compliance by a Court of competent jurisdiction. While the Loft Board may subject an owner to penalties upon such a finding (MDL § 284[1][ii]), the statute does not make such a finding a necessary predicate. Unless the Legislature has expressed an explicit intention to vest exclusive original jurisdiction in the administrative agency, the Court will be held to have concurrent jurisdiction (2 *NY Jur.2d* Administrative Law, §§ 178-80). Finally, the statute sets forth no obligation for tenants to post rent monies with the Court to protect an owner's property interest.

144 Misc.2d 316

902 ASSOCIATES, LTD.,
Petitioner-Landlord-Appellant,

v.

TOTAL PICTURE CREATIVE SERVICES, INC.
and Peter Schneider
Respondents-Tenants-Respondents.

Supreme Court, Appellate Term,
First Department.

July 6, 1989.

* * *

Before OSTRAU, P.J., and SANDIFER and McCOOE, JJ.

PER CURIAM:

Order entered December 23, 1987 (Taylor, J.) affirmed, with $10 costs.

[1] The issue is whether compliance with Multiple Dwelling Law section 284, subdivision 1 must be pleaded and proven in order to successfully maintain a nonpayment proceeding against an occupant of an interim multiple dwelling. We hold that it must.

This nonpayment summary proceeding was brought upon a petition which alleges the status of the building premises as an "interim multiple dwelling" under Article 7-C of the Multiple Dwelling Law. The premises were originally registered with the Loft Board in November, 1983.

While the owner of an interim multiple dwelling may recover rent from residential loft occupants notwithstanding the rent-forfeiture provisions of the Multiple Dwelling Law

applicable to owners of dwellings occupied without a certificate of occupancy, this right is contingent upon the loft building owner's "compliance" with Multiple Dwelling Law section 284 (see MDL §285, subd. 1). One of the primary "owner obligations" under section 284 is the filing and/or obtaining of appropriate alteration applications and permits, and the taking of "all reasonable and necessary action" to obtain a certificate of occupancy within 36 months from June 21, 1982, the effective date of the Loft Law (MDL §284, subd. 1[i]). The petition does not allege the requisite compliance with the Loft Law's owner obligations and is jurisdictionally defective (see *Blackgold Realty Corp. v. Milne*, 69 N.Y.2d 719, 512 N.Y.S.2d 25, 504 N.E.2d 392). Moreover, it is undisputed that the owner has not complied with the time requirements of section 284. There is no showing that the owner has taken any steps to bring the subject premises into compliance.

[2] The owner's argument that mere registration of the building as an interim multiple dwelling entitles it to collect rent misperceives the goal underlying the statutory scheme. The Loft Law permits actions for rent in the absence of a residential certificate of occupancy but the owner is required to move forward on his plans to legalize the premises within the time periods specified in the statute. The law does not contemplate a situation where owners will be permitted to collect rent while the building languishes indefinitely as an "interim" multiple dwelling. At some point — and the statute expressly defines the time period — an "interim" multiple dwelling must be upgraded to a class A multiple dwelling. To the extent an owner requires extensions of the time to comply, or to the extent the cost of compliance renders legal residential conversion infeasible, an owner is authorized to apply to the Loft Board for relief (MDL § 284, subd. 1[i]; § 285, subd. 2).

We appreciate that this is not an isolated case and that the dynamics of loft conversion are such that there are many dwellings which have not been legalized in conformity with the

time schedule originally set by the Legislature. Any claimed inequities should be addressed to the Legislature. This Court is charged with enforcing the statute as written. The language of the statute setting forth a timetable is clear and unequivocal and not subject to judicial interpretation.

Accordingly, inasmuch as the owner has failed to allege or demonstrate compliance with Multiple Dwelling Law § 284, subd. 1, a nonpayment summary proceeding may not be maintained and the petition was properly dismissed by the Civil Court.

OSTRAU, P.J., dissents in the accompanying memorandum.

OSTRAU, Presiding Justice, dissenting.

I respectfully dissent and would reverse the order appealed from and reinstate the petition in this non-payment proceeding.

By virtue, inter alia, of the acute housing shortage in this City, residential tenants, particularly during the 1970's, gravitated to space available in commercial loft buildings. Many of these "loft tenants" entered into conventional commercial loft leases which were little more than contrivances calculated to disguise the residential use to be made of the premises.

Multiple Dwelling Law §§ 301 and 302 forbid an owner from recovering rent from tenants of a multiple dwelling which lacks a valid certificate of occupancy. In *Lipkis v. Pikus*, 99 Misc.2d 518, 416 N.Y.S.2d 694 (Riccobono, J. dissenting) [AT1], affd. 72 A.D.2d 697, 421 N.Y.S.2d 825, lv. to app. denied 51 N.Y.2d 874, 433 N.Y.S.2d 1019, 414 N.E.2d 399, the Appellate Term, First Department confronted some of the anomalies arising from the residential use of commercial loft premises. Recognizing that landlords and tenants had to some extent acted in concert in unlawfully

converting commercial loft premises to residential use, the Appellate Term majority reversed the dismissal of non-payment proceedings notwithstanding tenants' assertion and proof that the premises there at issue lacked valid residential certificates of occupancy. Indeed, in Lipkis, the Appellate Term majority (in spite of the proscription of MDL §§ 301 and 302 against a landlord's recovering of rent from tenants of a multiple dwelling lacking a valid certificate of occupancy) awarded final judgment in favor of the landlord, stayed that judgment until such time as the landlord obtained valid certificates of occupancy, and directed the tenants to deposit with the Clerk of the Court of original jurisdiction any and all arrears in rent as well as accruing use and occupancy at the rate previously payable as rent, with those funds to be released to the landlord upon his securing residential certificates of occupancy. In so doing, the Appellate Term majority observed:

> "The pervasive extent of the problem confronting us is best illustrated by a report of the Department of City Planning (received in evidence) indicating that fewer than 10% of the industrial buildings located in Manhattan which have undergone total or partial conversion have valid certificates of occupancy for residential use. It seems obvious that the Multiple Dwelling Law provision under review did not envision a situation involving wholesale conversion of commercial properties precipitated by shifting patterns of industrial use and a resurgent demand for mixed residential/commercial space. In this context, we are not persuaded that the implicit condonation of widespread rent withholding actions, or "strikes", is the most feasible and equitable alternative to bring converted properties within the applicable multiple dwelling guidelines. That goal would be better achieved by the more stringent enforcement of building and zoning standards by the appropriate city agencies. In our discretion, however, we have conditioned enforcement of the final judgment granted herein upon petitioner's procurement of the requisite certificate of occupancy. We view this relief

> as giving balance to the competing interests of both parties by avoiding unjust enrichment to the tenants and stimulating expeditious completion of the actions necessary to legalize the conversion.", (Lipkis v. Pikus, 99 Misc.2d 518, 520-521, 416 N.Y.S.2d 694 [AT1]).

The Appellate Term's formulation in the Lipkis case has been superseded by the passage of Article 7-C of the Multiple Dwelling Law (§§ 280-287) [L.1982, C. 349, § 1]. MDL § 280, characterizes the public emergency giving rise to the enactment of Multiple Dwelling Law Article 7-C, and further provides:

> ....the intervention of the state and local governments is necessary to effectuate legalization.... of the present illegal living arrangements in such "de facto" multiple dwellings, and to establish a system whereby residential rentals can be reasonably adjusted so that residential tenants can assist in paying the cost of such legalization without being forced to relocate; that in order to prevent uncertainty, hardship, and dislocation, the provisions of this article are necessary and designed to protect the public health, safety and general welfare.

To maintain existing rent rolls of interim multiple dwellings, MDL § 285(l) was promulgated to provide:

> Notwithstanding the provisions of section three hundred two or three hundred twenty-five of this chapter, the owner of an interim multiple dwelling may recover rent payable from residential occupants qualified for the protection of this article on or after April first, nineteen hundred eighty, and maintain an action or proceeding for possession of such premises for non-payment of rent, provided that he is in *compliance* with this article. (emphasis added)

The instant proceeding was dismissed by the court of original jurisdiction upon the ground that notwithstanding the issuance of an interim multiple dwelling registration number for the premises, the landlord was not in "compliance" with MDL Article 7-C. MDL § 284 provides, inter alia, a schedule for owners of interim multiple dwellings to legalize their premises. Admittedly, the landlord in the instant proceeding has failed to meet the statutory schedule for securing a residential certificate of occupancy for the premises, and because of that failure the court of original jurisdiction concluded that the landlord is not in "compliance" with MDL Article 7-C and thus not entitled to maintain this non-payment proceeding against the tenant (MDL §285[1]).

However, to so strictly construe MDL § 285, subdivision 1, is to ignore the ramifications of MDL § 282, wherein the legislature provided for the creation of a "loft board" to assume jurisdiction over the myriad complexities which confront landlords of loft premises in meeting their obligation to secure residential certificates of occupancy for their premises. Very few interim multiple dwellings in this City have been legalized, and of those few that have been legalized, most are cooperative premises in which the proprietary's lessees have had an obvious economic incentive to undertake such legalization.

The simple fact of the matter is that the Appellate Term majority, in affirming the dismissal of this non-payment proceeding, has now jeopardized the rent roll of almost every interim multiple dwelling in this City. The majority's holding in this case is manifestly more restrictive than even the Appellate Term's earlier formulation in the Lipkis case, and it raises the specter of bankruptcy for most interim multiple dwellings. To my view, the majority's holding represents an overly restrictive construction of Article 7-C, particularly since Article 7-C is primarily designed to guarantee the rent roll so necessary if services are to be provided and if the orderly legalization of

interim multiple dwellings is to proceed. It is most significant that the loft board itself, with its broad powers to regulate interim multiple dwellings, has not suggested that the tenants of the interim multiple dwellings which have not been legalized in accordance with the schedule provided by MDL § 284(1) which as indicated above constitute the vast majority of interim multiple dwellings in this City are now completely relieved of the obligation to pay rent.

The tenant in this proceeding has not suggested that the landlord has failed to provide services or that the premises have deteriorated. To my view, and in the absence of a determination by the loft board to the contrary, the landlord is entitled to recover rent for the premises at issue and to maintain this nonpayment proceeding, (cf., *Corris v. 129 Front Co.*, 85 A.D.2D 176, 447 N.Y.S.2D 480 [Sandler, J. dissenting in part]). To suggest, as does the majority, that the answers to the immediate questions raised by this appeal are to be found in the legislature, is to defer to the problematic, to defy experience and to afford no relief for the significant dislocation which the majority's holding will certainly cause.

EXCERPTS OF THE UNITED STATES CONSTITUTION

Article I

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

* * *

Article. III.

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; [between a State and Citizens of another State; —]* between Citizens of different States — between Citizens of the same State claiming Lands under Grants of different States, [and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.]

* * *

Article. VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * *

Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without

due process of law; nor shall private property be taken for public use without just compensation.

Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

* * *

Amendment VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflected.

* * *

Amendment XIII.

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

* * *

Amendment XIV.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

42 U.S.C. § 1988 provides:

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title 'CIVIL RIGHTS,' and of Title 'CRIMES,' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of

1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Supreme Court, U.S.
FILED
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No. 90-1522

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

640 BROADWAY RENAISSANCE COMPANY,
Debtor in Possession, Petitioner,

-v.-

MARIO CUOMO, as Governor of the State of New York, et al.,
Respondents,

-and-

PHOEBE RENTSCHLER, et al.,
Defendants.

BRIEF OF MUNICIPAL RESPONDENTS IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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April 25, 1991.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Was petitioner's challenge to the constitutionality of Article 7-C of the New York State Multiple Dwelling Law, §§ 280 et seq. (the "Loft Law"), under the Due Process and Equal Protection clauses of the Fourteenth Amendment, the Taking Clause of the Fifth and Fourteenth Amendments, and the Contract Clause of Article I, Section 10, properly dismissed on the ground that this Court's decision in Spring Realty Co. v. New York City Loft Board, 127 Misc.2d 1090, 487 NYS2d 973 (Sup. Ct. NY Co. 1985), aff'd, 117 AD2d 1029, 498 NYS2d 241 (1st Dep't), aff'd as modified on other grounds, 69 NY2d 657, 803 NE2d 1367, 511 NYS2d 830 (1986), appeal dismissed for want of a substantial federal question, 482 US 911 , 107 SCt 3179, 96 (LEd 2d 668 (1987), decided those same issues against the position taken by petitioner herein?

2. Was petitioner's challenge to the legislation in issue on the ground that it

constituted a bill of attainder properly dismissed as a matter of law since there was no evidence of legislative intent to punish?

3. Was petitioner's challenge to the legislation in issue on the ground that it violated petitioner's "vested rights" properly dismissed as a matter of law since a property owner has no vested right to the continuation of extant zoning law?

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No. 90-1522
IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

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640 BROADWAY RENAISSANCE COMPANY,

Debtor in Possession, Petitioner,

-v.-

MARIO CUOMO, as Governor of the State of New York, et al.,

Respondents,

-and-

PHOEBE RENISCHLER, et al.,

Defendants.

BRIEF OF MUNICIPAL RESPONDENTS IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT OF THE CASE

The instant petition seeks review of a Court of Appeals order, in the form of a mandate, affirming the dismissal of petitioner's complaint, which alleged various challenges to the constitutionality of Article

7-C of the New York State Multiple Dwelling Law, §§ 280 et seq. (McKinney Supp. 1990) (the "Loft Law"). By a judgment of July 31, 1990, the District Court for the Southern District of New York granted summary judgment in favor of defendants Cuomo, Koch, and members of the New York City Loft Board. By order of January 2, 1991, the United States Court of Appeals for the Second Circuit unanimously affirmed the judgment of the District Court, on the ground that the majority of the claims were barred under the ruling of Spring Realty Co. v. New York City Loft Board, 127 Misc.2d 1090, 487 NYS2d 973 (Sup. Ct. NY Co. 1985), aff'd, 117 AD2d 1029, 498 NYS2d 241 (1st Dep't), aff'd as modified on other grounds, 69 NY2d 657, 503 NE2d 1367, 511 NYS2d 830 (1986), appeal dismissed for want of a substantial federal question, 482 US 911, 107 SCt. 3179, 96 LEd 2d 668 (1987) ("Spring Realty"); and the remaining claims

(bill of attainder and "vested rights") were without merit as a matter of law.

REASONS FOR DENYING THE WRIT

As expressed by the Court of Appeals, petitioner herein "presents a host of challenges to the constitutionality of Article 7-C of the New York State Multiple Dwelling Law, §§ 280 et seq." (the "Loft Law"). When petitioner's property at 640 Broadway in the City of New York was designated as covered by certain provisions of the Loft Law, petitioner brought suit seeking declaratory and injunctive relief invalidating the Loft Law and an award of three million dollars in damages from the government defendants.

In response to this challenge, the government defendants sought dismissal of the complaint on the ground that the majority of the claims had been disposed of by this Court in Spring Realty Co. v. New York City Loft Board, 127 Misc.2d 1090, 487

NYS2d 973 (Sup. Ct. NY Co. 1985), aff'd, 117 AD2d 1029, 498 NYS2d 241 (1st Dep't), aff'd as modified on other grounds, 69 NY2d 657, 503 NE2d 1367, 511 NYS2d 830 (1986), appeal dismissed for want of a substantial federal question, 482 US 911, 107 SCt 3179, 96 LEd 2d 668 (1987).

The District Court for the Southern District of New York agreed that the majority of petitioner's claims had been decided against petitioner's position, in Spring Realty. The Court of Appeals agreed, holding that

> The Supreme Court's dismissal of a prior challenge to the Loft Law in Spring Realty Co. v. New York City Loft Board, 127 Misc.2d 1090, 487 N.Y.S.2d 973 (Sup. Ct. N.Y. Co. 1985), aff'd, 117 A.D.2d 1029, 498 N.Y.S.2d 241 (1st Dep't); aff'd as modified on other grounds, 69 N.Y.2d 657, 503 N.E.2d 1367, 511 N.Y.S.2d 830 (1986), appeal dismissed for want of a substantial federal question, 482 U.S. 911 (1987), bars the majority of [640] Broadway's constitutional claims. Once the Supreme Court has dismissed an appeal for want of a substantial federal question, we are bound to

> treat that decision as rejecting on the merits those issues presented in the jurisdictional statement and necessarily decided. See Mandel v. Bradley, 432 U.S. 173 (1977) (per curiam); League of Women Voters v. Nassau County Board of Supervisors, 737 F.2d 155 (2d Cir. 1984), cert. denied sub nom. Schmertz v. Nassau County Board of Supervisors, 469 U.S. 1108 (1985). Spring Realty precludes reconsideration of [640] Broadway's claims under the Due Process and Equal Protection clauses of the Fourteenth Amendment, the Takings Clause of the Fifth and Fourteenth amendments, and the Contract Clause of Article I, Section 10.

Petition for Certiorari, A1-A3.

Furthermore, the Court of Appeals held, the claims of the plaintiffs in Spring Realty were indeed ripe, rejecting petitioner's reading of that case. This Court's dismissal of the appeal in Spring Realty for want of a substantial federal question was, therefore, made on the merits. The claims presented by petitioner herein, on essentially the same grounds as were presented in Spring Realty, that is, challenges to the validity of the Loft Law on

a variety of constitutional grounds, were therefore properly dismissed as having been decided and rejected by this Court.

Only two issues raised by petitioner herein had not been considered by the courts in Spring Realty: that the Loft Law constituted a bill of attainder in violation of Article I, Section 10, and that the Loft Law impairs petitioner's "vested property right" in the commercial certificate of occupancy issued to the property before the enactment of the regulations in issue. As was held by the District Court, and affirmed by the Court of Appeals, those claims are without merit as a matter of law since, respectively, there is no evidence of legislative intent to punish (see Selective Service System v. Minnesota Public Interest Research Group, 468 US 841, 852, n.8, 104 S Ct 3348, 82 LEd 2d 632 (1984); nor does a property owner acquire a vested right to the status quo where, by the exercise of police power, the

State imposes additional or new requirements with respect to the use of such property (see Oriental Boulevard Co. v. Heller, 88 Misc.2d 920, 928-929, 297 NYS2d 431, 441 (Sup. Ct. Kings Co. 1969), modified on other grounds and aff'd as modified, 34 AD2d 811, 311 NYS2d 635 (2d Dep't), aff'd, 27 NY2d 212, 316 NYS2d 226, 265 NE2d 72 (1970), appeal dismissed for want of a substantial federal question, 401 US 986, 91 S Ct 1234, 28 LEd 2d 527 (1971)).

The District Court, as affirmed by the Court of Appeals, correctly determined that petitioner's due process, equal protection, Contract Clause, and takings claims were previously presented to and adjudicated by both the New York State courts and this Court and further that there were neither significant factual distinctions between the plaintiff in Spring Realty and petitioner herein, nor had there been any doctrinal developments undermining Spring Realty.

The courts below also correctly determined that the bill of attainder and "vested rights" arguments were without merit as a matter of law. The Courts below therefore correctly determined that the entire complaint should be dismissed.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

April 25, 1991.

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